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AND

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WITH NOTES
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BY

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PREFACE TO THE SEVENTH EDITION.

SINCE November, 1891, when the Sixth Edition of this work was issued, the Statute Law with which it deals has been, in some respects, modified and extended by the Conveyancing and Law of Property Act, 1892, and the Married Women's Property Act, 1893; in others, it has been consolidated by the Trustee Act, 1893, with its attendant Amendment Act of 1894; while a considerable growth of reported decisions has further settled its practical effect.

The Trustee Act, 1893, made it necessary to recast much old matter, and to add some that is new. The subject-matter of Part III. of that Act was hardly touched by the earlier editions; nor does the present one profess to deal with it exhaustively.

In other respects, this edition is on the same lines as its predecessors.

May, 1895.

PREFACE TO THE FIFTH EDITION.

THE Conveyancing Acts and the Settled Land Acts have now been in force for a time sufficient to render it no longer necessary to illustrate their operation by precedents of deeds. Therefore the Precedents contained in the previous editions of the two books on the Conveyancing Acts and Settled Land Acts are omitted and both sets of Acts with the notes are included in the present volume, leaving the Precedents to be issued at a future day as a separate volume.

When the Bills for these Acts were first introduced in 1880, many zealous advocates of reform in the Land Laws objected that the proposed enactments were only amendments of an old and cumbrous system, and that an entirely new system must be substituted. Nine years have passed and no new system has yet been established or appears likely to be established. The most perfected new system, namely, that introduced by Lord Cairns' Act of 1875, and upon which the recent Government Bills have been modelled, was a failure as regards extensive usefulness, not because there was any indisposition to adopt it, for it has been adopted in many cases where suitable, but because it did not answer the general requirements of Landowners. In the recent Bills it was sought to hide failure by resorting to compulsion, and

the result is that the Bill of this Session has failed to pass the House of Lords mainly on account of the compulsory clauses. But compulsion would only render failure more certain ; every hindrance, mistake, or delay would be magnified by discontented persons compelled to adopt a new system against their will. Delay at least there must often be in a Government legal office, where the staff would be kept down to the lowest possible limit.

If a Land Register is to be established the true course is to make its use voluntary and to follow the example afforded by the Stock Register kept by the Bank of England. The Register should be kept by a Public Company, who should deposit with the Government a large portion of their capital as a guarantee fund, and be allowed to make a small profit on all transactions. The Company should also be a general Guarantee and Trust Company, and would insure to each registered owner the value of his land in case he is dispossessed, and also insure him against incumbrances. For its own sake the Company would conduct the business of registration properly in order to transact business ; it would give the utmost possible facilities for first registration and subsequent dealings with land, and on first registration would, in consideration of an insurance premium, take the risk of possible or contingent charges, and also either for or without a premium take the risk of registering titles, practically safe, though not technically good. This latter risk the Registrar in a Government office will never take, having over him the fear of the Chancellor of the Exchequer, should a claim be made under the guarantee of title.

Besides establishing a Register of the kind above

suggested, further amendments may usefully be made in the existing law. Even in its present shape that law gives many facilities for dealings with land which could not be obtained in a Register Office. There is no reason why each system old and new should not be capable of application to the cases in which it is most suitable.

July, 1889.

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ABBREVIATIONS.



C. A.	..	..	<i>means</i>	..	The Conveyancing and Law of Property Act, 1881.
C. A., 1882	..	..	..	..	The Conveyancing Act, 1882.
C. A., 1892	..	..	..	..	The Conveyancing and Law of Property Act, 1892
C. L. P. A.	..	..	..	..	The Common Law Procedure Act, 1852.
C. L. P. A., 1860	..	..	..	..	The Common Law Procedure Act, 1860.
M. W. P. A.	..	..	..	..	The Married Women's Property Act, 1882.
M. W. P. A., 1884	..	..	..	..	The Married Women's Property Act, 1884.
M. W. P. A., 1893	..	..	..	..	The Married Women's Property Act, 1893.
R. S. C.	..	..	..	..	Rules of Supreme Court.
S. E. A.	..	..	..	..	The Settled Estates Act, 1877.
S. L. A.	..	..	..	..	The Settled Land Act, 1882.
S. L. A., 1884	..	..	..	..	The Settled Land Act, 1884.
S. L. A., 1887	..	..	..	..	The Settled Land Acts (Amendment) Act, 1887.
S. L. A., 1889	..	..	..	..	The Settled Land Act, 1889.
S. L. A., 1890	..	..	..	..	The Settled Land Act, 1890.
T. A., 1850	..	..	..	..	The Trustee Act, 1850.
T. A., 1852	..	..	..	..	The Trustee Act, 1852.
T. A., 1888	..	..	..	..	The Trustee Act, 1888.
T. A., 1889	..	..	..	..	The Trust Investment Act, 1889.
T. A.	..	..	..	..	The Trustee Act, 1893.
T. A., 1894	..	..	..	..	The Trustee Act (1893) Amendment Act, 1894.
V. & P. A.	..	..	..	..	The Vendor and Purchaser Act, 1874.

ADDENDA.

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Page 14, after line 11, add, "As to re-opening, in an action for specific performance, a question decided on summons under the V. & P. A., see *Scott v. Alvarez*, 1895, 1 Ch. 596, 621, 622."
- Page 18, line 21, after subs. xvii., add, "In all Acts of Parliament passed after 1889, 'person' includes any body of persons corporate or incorporate: see the Interpretation Act, 1889, s. 19."
- Page 20, line 21, add, "see also *Scott v. Alvarez*, 1895, 1 Ch. 596, 626."
- Page 25, line 8, add, "see also *Re Pyle*, 1895, 1 Ch. 724."
- Page 26, line 12, after (vit.), add, "It is conceived that a charitable annuity is as much an incumbrance as any other: see *Re Bective Estates*, 27 L. R. Ir. 364, 369."
- Page 41, line 24. After the reference to *Church v. Brown*, add, "As to a purchaser's right to a chain of covenants, see *Re Scott and Alvarez*, 1895, 1 Ch. 596, 606."
- Page 57, 4th line from foot, add, after "mortgage": "and see *Everitt v. Automatic Weighing Machine Co.*, 1892, 3 Ch. 506."
- Page 109, line 8. *Re Davenport* is now reported, 1895, 1 Ch. 361.
- Page 126, line 23. The case cited as *Bowling v. Wilby* is now reported as *Re Bowling and Welby's Contract*, 1895, 1 Ch. 663.
- Page 183, line 7. For "Hayward" read "Haywood."
- Page 189. Before last line on page, add, "As to time not running against a beneficiary who takes several successive interests, in respect of any interest in reversion, see *Mara v. Browne*, W. N., 1895, 75; 39 Sol. J. 423."
- Page 203, last line on page. After the reference to *Re Sheppard's Trusts*, add, "see also *Cradock v. Witham*, W. N., 1895, 75."
- Page 206, line 14. For "March," read "Murch."
- Page 207, line 4, after "cited," add, "see also *Re Cutler*, 39 Sol. J. 484."
- Page 207, line 17, add, "see also *Cradock v. Witham*, W. N., 1895, 75."
- Page 218. After the reference to C. A., s. 38, add, "which expressly mentions executors and executorships, as well as trustees and trusts: but see T. A., s. 50, *infra*, pp. 238, 239, for the meaning of 'trust' and 'trustee' in this Act."

- Page 219, 10th line from foot. After "see," insert, "as to the principles which guide the Court in the choice of a new trustee, *Re Tempest*, 1 Ch. 485; and."
- Page 224, line 6. The case cited as *Re Cook's Trusts* is now reported as *Re Cook's Mortgage*, 1895, 1 Ch. 700.
- Page 234, 12th line from foot. After the reference to *Re Somerset*, add, "*Mara v. Browne*, W. N., 1895, 75; 39 Sol. J. 423."
- Page 256, line 12. After the reference to *Re Helsby*, add, "but one carrying on a business of her own, which her husband manages, does: *Re Edwardes*, 39 Sol. J. 398."
- Page 257, line 27. The case cited as *Re Long* is now reported as *Re Leng*, 1895, 1 Ch. 652.
- Page 278. After line 16, add, "this s. applies to proceedings pending at the commencement of the Act: *Re Godfrey*, 39 Sol. J. 200; W. N., 1895, 12."
- Page 289, 9 lines from foot. For 3 Ch. read 2 Ch.
- Page 290, line 10. After the reference to *Re Ridge*, add, "compare *Re Hodges' S. E.*, W. N., 1895, 69, and cases there cited."
- Page 373, 11th line from foot. Insert between "and" and "subject" the word "land."
- Page 381, 10th line from foot. After the reference to *Re Ridge*, add, "and compare *Re Hodges' S. E.*, W. N., 1895, 69, and cases there cited."

PART I.

VENDOR AND PURCHASER AND CONVEYANCING ACTS.

CHAPTER I.

GENERAL EFFECT ON TITLES OF THE VENDOR AND PURCHASER ACT, 1874, THE CONVEYANCING ACTS, 1881, 1882, AND THE TRUSTEE ACT, 1893.

THE following is a short statement of the manner in which the V. & P.A., the C. A., the C. A., 1882, and the T. A. affect the form and contents of various documents.^(a)

Effect of V. & P.A., C. A., C.A. 1882, and T. A. on form and contents of documents.
Contracts.

- (1.) Contracts for sale need not contain conditions as regards title and evidence of title except in special cases, as where the title is less than forty years, or where deeds abstracted cannot be produced, &c.: C. A., s. 3. An open contract may be safely made in case of an ordinarily good forty years' title, but it is advisable in all cases to state the date of commencement (see note to C. A., s. 3 (3)), and it is necessary to state it in the following cases:—

- (a) Advowsons or reversionary interests (Dart, 334, 335, 6th ed.).

(a) See the meaning of abbreviations stated at the end of the Table of Cases, *suprà*.

- (b) Tithes or other property derived from the Crown where evidence of the Crown grant is to be negatived.
- (c) Where the document first abstracted is a will and evidence of seisin is to be precluded: *Parr v. Lovegrove*, 4 Drew, 170.
- (d) Where the document first abstracted is a voluntary settlement (but see remarks of Cotton, L.J., in *Re Marsh and Earl Granville*, 24 Ch. D. 11, at p. 24; *Noyes v. Paterson*, 1894, 3 Ch. 267; and the Voluntary Conveyances Act, 1893), or articles for a settlement, or a conveyance under a power or trust for sale, or the bar of an entail, or other document of a similar kind, deriving its effect from some prior instrument.

If the date be not fixed, the date of a recited deed may be the time prescribed by V. & P. A., s. 1 (see the last clause of that s.), and an abstract of the deed may be required. The safest course is always to fix the date of commencement, and to state the nature of the instrument with which the title commences. A good commencement helps to satisfy a purchaser.

Abstracts.

- (2.) With the above exceptions abstracts of title commence—
 - (a) As to freeholds with a document at least forty years old: V. & P. A., s. 1.
 - (b) As to leaseholds for years with the lease or underlease: V. & P. A., s. 2, r. 1, and C. A., s. 3 (1).
 - (c) As to the freehold interest in enfranchised copyholds or customary freeholds with the deed of enfranchisement: C. A., s. 3 (2).

Seisin of testator.

But where the abstract commences with a will no alteration in the practice is made, consequently evidence of seisin may or may not be required, according to circumstances, and a clause preventing any requisition on this point may still be necessary.

Leaseholds.

- (d) A lease or underlease is to be deemed *prima facie* good, the last receipt for rent being

evidence of performance of covenants, and, in case of an underlease, of performance also of covenants in the superior lease up to the date of actual completion of the purchase: C. A., s. 3 (4), (5); but a special condition is necessary where there is a peppercorn rent or a rent which is not a money rent: *Moody and Yates' Contract*, 28 Ch. D. 661, 30 *ib.*, 344.

(3.) Recitals

Recitals.

- (a) Of facts in documents, as to *land or hereditaments*, twenty years old are evidence: V. & P. A., s. 2, r. 2.
- (b) Of documents, as to *any property*, dated prior to the legal or stipulated time for commencement of the abstract are to be taken as correct, and production is not to be required: C. A., s. 3 (3).

(4.) Expenses

Expenses.

Of evidence required in support of the abstract and not in the vendor's possession are thrown on the purchaser: C. A., s. 3 (6).

(5.) In documents after 1881 there need be

What clauses, &c., to be omitted in documents.

- (a) No general words: C. A., s. 6.
- (b) No all estate clause: C. A., s. 63.
- (c) No special directions as to the mode of sale in a trust or power for sale, but only the words "Upon trust to sell" or "With power of sale," as the case may be: T. A., s. 13.
- (d) No receipt clause: C. A., s. 22; T. A., s. 20.
- (e) No mortgage joint account clause: C. A., s. 61.
- (f) No power to survivors or survivor of several executors or trustees to do any act: T. A., s. 22; nor to "assigns." New trustees duly appointed have all the powers of the original trustees; T. A., s. 10 (3), & s. 37; and (except so far as s. 30 of C. A. is repealed in the case of copyhold or customary land by the Copyhold Act, 1887, s. 45 (now the Copyhold Act, 1894, s. 88), there can now be no assign by devise of a trust estate. Powers may be given

simply to trustees, their executors or administrators.

- (g) No mention either of heirs, executors, administrators, or assigns, whether of covenantor or covenantee, obligor or obligee, nor of the survivors or survivor of several covenantees or obligees, nor of the heirs, executors, or administrators of the survivor, nor of their or his assigns, need be made in covenants or bonds: C. A., ss. 58, 59, 60; except where a restrictive (a) covenant is intended to be made binding so far as the law allows on the land, and then the assigns of the covenantor should be mentioned.
- (h) No particular technical operative word is required to pass a freehold: C. A., s. 49.
- (i) No necessity for the word "heirs," "heirs of the body," &c., to create an estate of inheritance. (But on this point there is still a distinction between a deed and a will. In a deed the estate to be limited must still be described accurately as "fee simple," "in tail," &c., or as before the C. A., and cannot be created, as in a will, by informal expressions): C. A., s. 51.
- (k) No multiplication of receipt clauses for consideration. One receipt in the body of the deed or indorsed is sufficient: C. A., ss. 54, 55.
- (l) No power to executors, administrators, or trustees to compound or compromise: T. A., s. 21.
- (m) No remedy for the recovery of rent-charges: C. A., s. 44.
- (n) No powers for the receipt or application of income, nor for the accumulation of surplus income during minority: C. A., ss. 42, 43.(b)

(a) Whether any other covenant can be made binding on the land see *London and S. W. Railway Company v. Gomm*, 20 Ch. D. 562, and second note to C. A., s. 58, *infra*.

(b) But where any trust of the accumulated rents and profits other than those stated in s. 42 (5) (iii.) is required, it must be mentioned.

- (6.) Covenants for title are not required, but by stating the character in which a person conveys the proper covenant by him is incorporated : C. A., s. 7. Covenants for title.
- (7.) A covenant for production of deeds is no longer required. A mere acknowledgment as defined by the Act gives the proper title to production and delivery of copies, and a mere undertaking gives the proper remedy in case of destruction or damage : C. A., s. 9. Covenant to produce deeds.
- (8.) In a mortgage by *deed* there are supplied Powers conferred on mortgagors and mortgagees.
- (a) Power for mortgagor and mortgagee when in possession to grant leases : C. A., s. 18. In some cases it may be necessary to vary this power : but it is conceived that the power ought not in any case to be entirely negatived.
 - (b) Power for mortgagee to sell and to insure against fire, and when in possession to cut and sell timber : C. A., ss. 19, 23.
 - (c) Power for mortgagee to appoint a receiver : C. A., ss. 19, 24.
 - (d) Power for mortgagee to give a receipt for sale money and other money comprised in the mortgage, and trusts for application thereof : C. A., s. 22.
- (9.) In a will, a devise of trust and mortgage estates is not required and should not be inserted (except in the case of copyhold or customary land to which there has been an admission), and is practically inoperative if inserted : C. A., s. 30. Devise of trust and mortgage estates.
- (10.) As to appointments of new trustees, Appointment of new trustees.
- (a) A power to appoint new trustees is only required where it is to be exercised otherwise than by the trustees or trustee for the time being : T. A., s. 10 (1).
 - (b) The original number of trustees need not be preserved, except that where there were originally two or more, one cannot be discharged unless two places at least be full : T. A., ss. 10, 11.

- (c) An appointment of new trustees should contain the proper declaration as to vesting; and where there are more than two trustees, and one simply retires and his place is not filled up, there must be a deed of consent to his discharge and to the vesting of the trust property in his co-trustees: T. A., s. 12.
- Separate trustees.** (d) A separate set of trustees may at any time be appointed for each distinct trust: T. A., s. 10.
- Powers of attorney.** (11.) As to powers of attorney,
- (a) A power given for valuable consideration can be made irrevocable in favour of a purchaser, lessee, or mortgagee: C. A., 1882, s. 8.
- (b) Any power of attorney can, in favour of the same persons, be made irrevocable for any period not exceeding one year from its date: C. A., 1882, s. 9.
- (c) The attorney may sign and seal in his own name: C. A., s. 46.
- (d) Access to a power of attorney is enabled by means of deposit in the Central office, and office copies can be obtained: C. A., s. 48.
- Executory limitations.** (12.) In instruments after 1882 an executory limitation over of an estate in fee, or for a term, on failure of issue, becomes incapable of effect when any of the issue attain the age of twenty-one years: C. A., 1882, s. 10. This section applies only to land or hereditaments.
- Disclaimer of powers.** (13.) Powers, whether coupled with an interest or not, can be disclaimed, in like manner as an estate can be disclaimed: C. A., 1882, s. 6.
- Supplemental deeds.** (14.) Deeds may be supplemental or annexed instead of indorsed, and will be read as indorsed on, or containing a full recital of, the principal deed: C. A., s. 53.

CHAPTER II.

THE VENDOR AND PURCHASER ACT, 1874.

37 & 38 VICT. c. 78.

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land. [7th August, 1874.]

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

S. 1.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

Forty years substituted for sixty years as the root of title.

The word "land" in Acts of Parliament passed since 1850 includes messuages, tenements and hereditaments, houses and buildings of any tenure, unless the contrary intention appears: see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

Definition of "land" in Acts of Parliament.

A right of way is within this s.: *Jones v. Watts*, 43 Ch. D. 574. And see Co. Lit. 19 b, 20 a.

As to the title which may be required in the case of a leasehold interest more than forty years old, see *Williams v. Spargo*, W. N., 1893, 100.

S. 2.

Rules for
regulating ob-
ligations and
rights of
vendor and
purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

"Discovery"
by litigant.

Under such a contract production cannot, as between vendor and purchaser, be called for, even under the rules as to the right of a litigant to discovery: *Jones v. Watts*, 43 Ch. D. 574.

And this rule applies as between lessor and lessee, as well as vendors and purchasers in the ordinary sense of those words; and applies to a contract to grant an easement for a term: *Jones v. Watts*, *ubi supra*.

An agreement by the freeholder to deliver to the intended lessee an abstract of his title to grant the lease is "a stipulation to the contrary in the contract": *Re Pursell & Deakin*, W. N., 1893, 152.

Rule that
lessee has
notice of
lessor's title
not altered.

The rule that a lessee has constructive notice of his lessor's title has not been altered by this s. He is now in the same position with regard to notice as if he had before this Act stipulated not to inquire into his lessor's title (*Patman v. Harland*, 17 Ch. D. 353, 358; *Mogridge v. Clapp*, 1892, 3 Ch. 382, 397). S. 3 of C. A., 1882, as to notice, makes no alteration in this respect. It does not operate in favour of a person who enters into a contract whereby he precludes himself from "making such inquiries and inspections as ought reasonably to have been made": see subs. (1) (i.).

Underlease.
Contract for
lease under
power.

As to a contract for an underlease, see C. A., s. 13.

By s. 4 of C. A., 1882, the contract for a lease made under a power does not form part of the title to the lease.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

Effect of recital
twenty years
old.

In *Bolton v. London S. Board*, 7 Ch. D. 766, a recital in a deed more than twenty years old that a vendor was seised in fee simple was held sufficient evidence of that fact, precluding the purchaser from demanding a prior abstract, except so far as the recital was proved to

be inaccurate. The decision seems open to question, as it in effect negatives the recognized right of a purchaser to a proper abstract of title extending over forty years, which might show the recital to be inaccurate.

SS. 2, 3, 4.

As to the effect of a recital under this s., see also *Re Marsh and Earl Granville*, 24 Ch. D. 11.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

As to the purchaser's equitable right to production of documents, see Sug. V. & P. c. 11, s. 5, 14th ed.; Dart, 160, 6th ed.; *Fain v. Ayers*, 2 Sim. & St. 533.

Purchaser's equitable right to production of documents.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

Contracts for sale, where the vendor retains any documents, should now provide for giving an acknowledgment in writing of the right of the purchaser to the production, and delivery of copies under C. A., s. 9, and, where he is beneficial owner, also an undertaking for safe custody. The liability to give the covenant under s. 2, r. 4, of this Act, if incurred after 1881, is satisfied by an acknowledgment: C. A., s. 9 (8), (14).

Acknowledgment substituted for covenant.

As to the costs of attested and other copies of documents retained by the vendor, see C. A., s. 3 (6).

3. *Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.*

Trustees may sell, &c., notwithstanding rules.

Repealed by the T. A., but re-enacted by s. 15.

4. *The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the*

Legal personal representative

SS. 4, 5.

may convey
legal estate of
mortgaged
property.

mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.

Repealed and superseded by s. 30 of the C. A. as to deaths happening after 1881, which s. has in its turn been repealed by s. 45 of the Copyhold Act, 1887 (see now s. 88 of the Copyhold Act, 1894), so far as regards copyhold or customary land to which the mortgagee has been admitted. Such land now remains in the same position with respect to its devolution on death of the mortgagee as before the V. & P. A. The repeal did not revive or affect this s. of the V. & P. A. (see the Interpretation Act, 1889, s. 11), which remains operative as regards deaths between the 7th August, 1874, and the 1st January, 1882, or as regards deaths at any time before the 1st January, 1882, assuming that it applies to mortgagees dying before the commencement of the V. & P. A. (on which see *Re Spradbery's Mortgage*; *Re White's Mortgage*, *ubi infra*).

This s. did not apply to a transfer of mortgage: *Re Spradbery's Mortgage*, 14 Ch. D. 514; *Re Brook's Mortgage*, 25 W. R. 841; nor to a sale: *Re White's Mortgage*, 29 *ib.*, 820.

Bare legal
estate in fee
simple to vest
in executor or
administrator.

5. *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.*

The expression "seised in fee simple" excluded copyholds and customary freeholds from the operation of this s.

Repealed as to England on and after the 1st January, 1876, by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48, except as to anything duly done thereunder before that date. Re-enacted by the same s. with an amendment confining its operation to a bare trustee dying intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, which s. has in turn been repealed by the C. A., s. 30, in case of deaths occurring after 1881. It would seem therefore that where nothing had been done under this s. before the 1st January, 1876, the hereditament of a bare trustee dying testate, and vested in his personal representative solely by force of this s., became divested and devolved as if the V. & P. A. had not been passed. Thus, up to the 1st January, 1882, where nothing had been done under this repealed s. before the 1st January, 1876, the devise by a bare trustee of his trust estate is operative.

Repealed as to Ireland by the C. A., s. 73, in case of deaths happening after 1881.

Meaning of
"bare trustee."

There is no distinction now between the case of a bare trustee and

any other trustee dying after 1881. A bare trustee is a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction, and has been requested by them so to convey it: *Dart*, 587, 6th ed.: and see *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582, 585, per M.R., and *Re Docwra*, cited on next s.; but in the opinion of V.C. Hall the words "has been requested by them so to convey it" are not a necessary ingredient in the definition of a bare trustee: *Christie v. Ovington*, 1 Ch. D. 279. A trustee with a beneficial interest in the trust estate is not a bare trustee within the Land Transfer Act, 1875, s. 48, which replaced s. 5 of the V. & P. A. (*Morgan v. Swansea &c. Authority*, *ubi sup.*); nor is the husband of a married woman who is seised in her right a bare trustee within the Act 3 & 4 Will. 4, c. 74, s. 34 (*Keer v. Brown*, Johns. 138); and see *Re Cunningham & Frayling*, 1891, 2 Ch. 567, from which it would seem that a person with active duties to perform, though not having any beneficial interest, is not a "bare trustee."

SS. 5, 6, 7.

6. *When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.*

Married woman who is a bare trustee may convey, &c.

Repealed by the T. A., but re-enacted by s. 16.

The aid of this s., or of the re-enactment, is only required in case of trust estates devolving on a married woman before 1883. As to all trust estates, whether freehold, copyhold or leasehold, devolving on her after 1882, she is in every respect in the same position as a feme sole: *M. W. P. A.*, ss. 1, 18.

This s. applies only to trust estates devolving before 1883.

Though a married woman who is trustee under a trust for sale takes an interest in the proceeds of sale, she is nevertheless a bare trustee within this s., where the sale is made under an order of the Court: *Re Docwra*, *Docwra v. Faith*, 29 Ch. D. 693.

It is conceived that where a married woman is mortgagee of freehold or copyhold land, the mere fact that the mortgage money has been paid to her husband does not convert her into a bare trustee under this s. Though the husband is entitled to the money when received, a mere receipt by him without a release duly acknowledged would not discharge the land as against the wife surviving and having the fee simple.

7. *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming*

Protection and priority by legal estate and tacking not to be allowed.

SS. 7, 8, 9. *such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.*

Repealed as to England by the Land Transfer Act, 1875, s. 129, and as to Ireland by the C. A., s. 73. In force in England between 7th August, 1874, and 1st January, 1876. The effect of this s. was to prevent a first mortgagee from being safe in making a further advance, his security for which became under this s. postponed to all intermediate mortgages: as to which, consider *Pease v. Jackson*, 3 Ch. App. 576, and *Hosking v. Smith*, 13 App. Cas. 582.

It is conceived that this s. did not, while in force, wholly abolish the protection given to a purchaser having the legal estate without notice of an equitable charge, but applied only to the case of two distinct interests, one of which could not stand alone without being protected by the other.

Non-registration of will in Middlesex, &c., cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

Time for registration of wills in Middlesex and Yorkshire.

As to the time allowed for the registration of wills in Middlesex, see 7 Anne, c. 20, ss. 8-10, and for the registration of wills in the W. Riding of Yorkshire, 2 & 3 Anne, c. 4, ss. 20, 21; in the E. Riding, 6 Anne, c. 35, ss. 14, 15; and in the N. Riding, 8 Geo. 2, c. 6, ss. 15-17, in the case of testators dying before 1st January, 1885. The time allowed for the registration in the three Ridings of Yorkshire of wills of testators dying on or after that day is now governed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 11, 14, as amended by 48 Vict. c. 4, and the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26).

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or

objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

S. 9.

This s. has been held to apply to a contract for a lease at a premium: *Re Anderton & Milner*, 45 Ch. D. 476; and to a lease without a premium: *Re Lander & Bagley*, 1892, 3 Ch. 41; *Re Stephenson & Coz*, 36 Solicitor's Journal, 287; *Re Pursell & Deakin's*, W. N., 1893, 152; and the language of s. 1. and s. 2, subs. 1, above. Cases under this s.

In proceedings under this s. the parties are in the same position as under a reference as to title in an action for specific performance, and accordingly evidence by affidavit is admissible (*Re Burroughs, &c.*, 5 Ch. D. 601). As to recovery under this s. of interest wrongly paid, see *Young & Harston's Contract*, 29 Ch. D. 691, 31 *ib.* 168. The deposit may be recovered with interest: *Re Smith & Stott*, 29 Ch. D. 1009 *n.*; *Hargreaves & Thompson's Contract*, 32 *ib.* 454, but see *Re Davis & Cavey*, 40 *ib.* 601; and the purchaser may be allowed his costs of investigating the title: *Higgins & Hitchman's Contract*, 21 Ch. D. 99; *Re Yeilding & Westbrook*, 31 *ib.* 344; *Hargreaves & Thompson's Contract*, *ubi sup.*; which may be charged on the vendor's interest in the property: *Re Yeilding & Westbrook*, *ubi sup.*; *Re Higgins & Percival*, W. N., 1888, p. 172; *Re Bryant & Barningham's Contract*, 44 Ch. D. 218, 222; *Re New Land Development Association & Gray*, 1892, 2 Ch. 138, 146; and the validity of a notice to rescind may be decided: *Re Jackson & Woodburn's Contract*, 37 Ch. D. 44; but not a question as to the existence or validity of the contract in its inception: see *S. C.* and *Re Davis & Cavey*, *ubi sup.*; *Re Sandbach & Edmondson*, 1891, 1 Ch. 99, 102; *Re Lander & Bagley*, *ubi sup.*; or as to the destination of the purchase-money, if it does not concern the purchaser: *Re Tippet & Newbould's Contract*, 37 Ch. D. 444.

The Court will not refuse to decide questions raised under this s., merely on the ground that specific performance of the contract would

SS. 9, 10.
—

not be enforced: the contract may be effective for purposes of other relief: *Re Lander & Bagley, ubi sup.*

Not every loss arising in connection with the contract can be assessed as compensation under this s.: see *Re Wilsons & Stevens*, 1894, 3 Ch. 546, 552-4.

On a vendor's application for a declaration that a good title had been shown, an order was made in the purchaser's favour rescinding the contract: *Re Higgins & Percival, ubi sup.*; and a vendor cannot, after a decision against him, avail himself of a condition empowering him "notwithstanding any previous . . . litigation" to rescind *without payment of costs*: see *Re Arbib & Class*, 1891, 1 Ch. 601. *affd.*

Extent of Act.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

CHAPTER III.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.
44 & 45 VICT. c. 41.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.

[22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

SS. 1, 2.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

PRELIMINARY.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-one.

Short title;
commence-
ment; extent.

(3.) This Act does not extend to Scotland.

2. In this Act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

Interpretation
of property,
land, &c.

As to effect of the word "includes" in an interpretation clause in an Act, see *Robinson v. Local Board of Barton-Eccles*, 8 App. Cas. 798, at p. 801; *Rodger v. Harrison*, 1893, 1 Q. B. 161, 167.

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S. 2.
PRELIMINARY.

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land :

For the meaning of "land" in Acts of Parliament see *suprà*, note to V. & P. A., s. 1.

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income :

(iv.) Manor includes lordship, and reputed manor or lordship :

Reputed
manor.

Where all the freehold estates held of a lord are purchased by him or devolve on him by escheat, whereby the services become extinct, the manor ceases to exist; also, there cannot be a manor without a court baron; and no court baron can be held without two freeholders as suitors at least. In case there be not two suitors the manor becomes a reputed manor, or manor in reputation; and continues to have certain rights and franchises which were appendant to the manor (1 Cruise, Dig. p. 34), as the right to wrecks, estrays, &c.: 1 Watk. Cop. 22; and the right to appoint a sexton of a parish: *Soane v. Ireland*, 10 East, 259; and if there be but one free tenant the seignory as to him remains with respect to his services, though there can be no court held: 1 Watk. Cop. 22.

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance :

See exceptions to this definition of conveyance, s. 7 (5), *infra*.

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in

possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property :

S. 2.
PRELIMINARY

See, on this subs., *Everitt v. Automatic Weighing Machine Co.*, 1892, 3 Ch. 506.

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum ; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof :

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property ; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser ; but sale means only a sale properly so called :

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise ; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift :

There may be a reservation of rent in kind : see *Co. Lit.*, 142a ; *Re Earl Pomfret*, 5 M. & S. 139, 143 ; *Re Moody & Yates*, 30 Ch. D. 344, pp. 346-7. Rent "in kind."

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings ; and a building lease is a lease for building purposes or purposes connected therewith :

"Repairing of buildings" : see *Re Daniell's S. E.*, 1894, 3 Ch. 503 ; *Easton v. Pratt*, 2 H. & C. 676.

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of

18 CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

- SS. 2, 3. mines and minerals, or purposes connected therewith,
PRELIMINARY. and includes a grant or licence for mining purposes :
(xii.) Will includes codicil :
(xiii.) Instrument includes deed, will, inclosure award,
and Act of Parliament :
(xiv.) Securities include stocks, funds, and shares :
(xv.) Bankruptcy includes liquidation by arrangement,
and any other act or proceeding in law, having, under
any Act for the time being in force, effects or results
similar to those of bankruptcy ; and bankrupt has a
meaning corresponding with that of bankruptcy :

Winding-up of Company. It is conceived that "bankruptcy" does not include proceedings for winding-up a Company : see *Re Oriental Bank*, 28 Ch. D. 634, 640. The point might arise in the case of a power of attorney given by a Company : see C. A., s. 47 ; C. A., 1882, ss. 8, 9.

(xvi.) Writing includes print ; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print :

(xvii.) Person includes a corporation : *add.*

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

See, on this sub., *Lock v. Pearce*, 1893, 2 Ch. 271, 275, 279 ; see also s. 69 (1), and *Cholmeley's School v. Sewell*, 1893, 2 Q. B. 254.

As to the exercise of the powers of the Court in regard to land in the Counties Palatine of Durham and Lancaster see s. 69 (9), and note thereon ; and as to the application of this Act to Ireland, see s. 72.

Singular includes plural, &c. In Acts of Parliament passed after 1850 singular includes plural, plural singular, masculine includes feminine, and month means calendar month unless the contrary intention appears : see the Interpretation Act, 1889, ss. 1, 3.

SALES AND OTHER TRANS- ACTIONS.

Contracts for Sale.

Application of
stated condi-
tions of sale to
all purchases.

II.—SALES AND OTHER TRANSACTIONS.

Contracts for Sale.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

This is supplementary to s. 2, rule 1, of V. & P. A., and (following that Act) does not apply to a lease for lives. It places the title to an underlease, in regard to showing the lessor's title, on the same footing as the title to a lease from the freeholder (see also s. 13 of this Act), and the assignee has in like manner constructive notice of the underlessor's title: *Patman v. Harland*, 17 Ch. D. 353; *Mogridge v. Clapp*, 1892, 3 Ch. 382, 394, 397. As to the effect of C. A., 1882, s. 3, see note to V. & P. A., s. 2, subs. 1.

This and subs. 3 preclude the purchaser from calling for or making any requisition, objection, or inquiry as to the underlessor's title, as between vendor and purchaser, but it does not alter the rule enabling the purchaser to prove the lease to be defective *aliunde*: see first note to subs. 3.

By s. 4 of C. A., 1882, a contract for a lease made under a power is excluded from forming part of the title to the lease.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

Under this subs. the title to the freehold of enfranchised copyholds is placed on the same footing as the title to a lease, and commences with the deed of enfranchisement. This subs. should be read in connection with subs. 3, under which a purchaser is precluded from requiring production of documents recited in the enfranchisement deed, and is bound to assume the correctness of the recitals.

Where, on an enfranchisement, mineral rights are reserved to the lord, the purchaser may object to the title: *Upperton v. Nickolson*, 6 Ch. 436, 444; *Bellamy v. Debenham*, 1891, 1 Ch. 412.

The word "purchaser" in this and the subsequent subs. of this s. means (notwithstanding the definition clause) a purchaser on a sale only: see subs. 8.

A copyholder obtaining enfranchisement after 1881 seems not entitled, in the absence of an agreement, to a statutory acknowledgment of the right to production of the freehold title: see *Re Agg-Gardner*, 25 Ch. D. 600, 604. But the exact point did not require decision, and it may be a question whether the dictum is right: compare *Re Pursell & Deakin*, W. N., 1893, p. 152. The s. does not say the copyholder himself may not call for the title, only that a purchaser of the freehold after enfranchisement may not. The acknowledgment and undertaking may be necessary for other purposes than that of a sale.

The following subs. 3, 6, 7, are not confined to land.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time

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Title to under-
lease.

How far objec-
tions, &c., are
precluded.

Contract for
lease under
power not
part of title.

Title to enfran-
chised copy-
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Meaning of
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prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise.

Production of
 or inquiry
 into early title.

On the two first clauses of this subs., see and consider *Re National Provincial Bank & Marsh*, 1895, 1 Ch. 190, and the cases there cited. The decision seems to establish a new distinction between the right to retain the deposit and the right to specific performance. *see*.

Contract
 should still
 fix date for
 commence-
 ment of title.

It is still advisable to provide expressly in all contracts as to the date at which the title is to commence. The V. & P. A. leaves it open to require an earlier title than forty years in cases similar to those in which an earlier title than sixty years could previously have been required. Thus where the first abstracted deed is a conveyance under a trust for sale, or under a power, or the bar of an entail, or contains recitals or other matter throwing a reasonable doubt upon the title as respects the contents or construction of the earlier documents, the purchaser is entitled to production, if not to an abstract, of the earlier title, and it may be said that the time back to which that earlier title should be shown is the time prescribed by law for commencement of the title: see *Parr v. Lovegrove*, 4 Drew. 170; Sug. V. & P., 14th ed., 366; Dart, V. & P., 6th ed., p. 337 and following pp. A voluntary deed dated less than forty years back is not a proper commencement of the title, where no indication of the nature of the instrument is given by the contract: *Re Marsh & Earl Granville*, 24 Ch. D. 11.

Constructive
 notice.

As to the bearing of this subs. on the doctrine of constructive notice, see note to C. A., 1882, s. 3, *infra*.

Right to old
 deeds, on com-
 pletion.

It is conceived that this subs. does not affect a purchaser's right, after completion, to have production of old deeds known to be in a vendor's possession or power: see Sug. V. & P., 14th ed., pp. 407, 433; Dart, V. & P., 6th ed., p. 762; *Parr v. Lovegrove*, 4 Dr. 170, note, pp. 182-3.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

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(5.) Where land sold is held by under-lease the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

The receipt of the superior landlord for ground rent paid by the tenant under threat of distress is not sufficient under subs. 5: *Re Higgins & Percival*, W. N., 1888, p. 172; 32 Solicitors' Jour., 558. As to the purchaser's right when the title to the reversion is in dispute, see *Pegler v. White*, 33 Beav. 403. As to what will be evidence of no breach, where no receipt is forthcoming, see *Ringer to Thompson*, 51 L. J. (Ch. D.) 42.

"The receipt."

Subss. 4 and 5 cover breaches after the contract and up to completion in all cases where a rent is reserved: see *Lawrie v. Lees*, 14 Ch. D. 249, 7 App. Cas. 19. But they do not apply to the exceptional case of a lease at a peppercorn rent (*Moody & Yates' Contract*, 28 Ch. D. 661, 30 *ib.* 344), and in such a case it should be expressly provided that the mere fact of possession at the time of completion of the purchase is to be sufficient evidence of performance.

Lease at a
nominal rent.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other

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documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying, is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

Expenses of
production.

As to the expense of producing documents and of attested copies which, but for this clause, would be borne by the vendor, see *Dart*, 159, 6th ed.; *Sug. V. & P.*, 14th ed., pp. 446-53. This subs. alters the rule as to the expense of journeys established by *Hughes v. Wynne*, 8 Sim. 85.

Subs. 6 only relates to expenses in reference to documents and abstracts of documents not in possession of the vendor, but of which he can procure the production, as deeds in the possession of a mortgagee: *Re Willett & Argenti*, W. N. 1889, 66. In the case of *Johnson & Tustin*, 28 Ch. D. 84, Pearson, J., considered that this subs. enabled a vendor who had no deeds in his possession except the conveyance to himself to throw on the purchaser the whole expense of making an abstract of the prior title, but this decision was reversed: 30 *ib.* 42. Every document of title, from the commencement of the title, must be abstracted in chief by the vendor: *Re Ebsworth & Tidy*, 42 Ch. D. 23, p. 34. If there are any documents of which the vendor cannot procure the production he must protect himself against production by a special condition.

Where docu-
ments cannot
be produced.

Where the lessee covenants to complete a house to the satisfaction of the lessor's surveyor, the certificate of the surveyor as to completion is part of the title and it must be obtained at the vendor's expense: *Moody & Yates' Contract*, 28 Ch. D. 661, 30 *ib.* 344.

Cases not
within this
subs.

Negative searches in the Irish Deeds Registry must be furnished at the vendor's expense: *Murray & Hegarty's Contract*, 15 L. R. Ir. 510.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same

title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchases on sales properly so called, notwithstanding any interpretation in this Act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

A sale is made when there is a complete contract for sale. The purchase-money then becomes personal estate of the vendor, and the land then becomes real estate of the purchaser : see *Lysaght v. Edwards*, 2 Ch. D. 507, and note to s. 4.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

See *Re National Provincial Bank & Marsh*, 1895, 1 Ch. 190.

Under this s., taken in connection with the V. & P. A., and in particular ss. 1 and 2 of that Act, a vendor having a title such as is usually accepted by a willing purchaser, may safely enter into an open contract for sale, without fear of being put to undue expense in answering requisitions or furnishing evidence. At the same time the purchaser will not incur more risk than in buying under suitable conditions of sale, since subs. 11 reserves to him every defence in an action for specific performance : see first note to subs. 3 of this s.

Trustees may buy or sell under contracts within this s. (see s. 66); and as to contracts under the V. & P. A., s. 2, see s. 15 of the T. A.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest

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Meaning of
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tected.

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vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

When vendor
not trustee.

"Personal Representative": for the meaning of these words, compare s. 30: see *Re Parker's Trusts*, 1894, 1 Ch. 707.

This s. should be read in connection with s. 30, and is not rendered unnecessary by that s. A vendor who has contracted to sell is not a trustee unless the contract is valid and binding on both parties at his death (*Lysaght v. Edwards*, 2 Ch. D. 506); and not even then, it seems, unless he received the purchase-money or a decree for specific performance has been made: *Re Colling*, 32 Ch. D. 333, and cases cited in the judgment: and compare *Re Pagani*, 1892, 1 Ch. 236. If the title be not accepted in the vendor's lifetime, or be not such as he could have enforced, he is not a trustee, though after his death the purchaser should accept the title, nor would the vendor be a trustee where the contract is not signed by, and so is not enforceable against, the purchaser: *Lysaght v. Edwards*, 2 Ch. D. 507. But in either case it might be enforceable by the purchaser.

Case where
action may
still be neces-
sary.

The s. applies to all cases where there is a contract "enforceable against the heir or devisee," that is at least to all cases where there is a clear written contract signed by the deceased vendor. The purchaser may then waive all objections and insist on performance, and an action will not now be required merely to obtain the legal estate where the vendor has died, having devised the land in settlement or otherwise in such manner that no conveyance can be obtained. But if there is any doubt whether a contract binding on the vendor subsisted at his death, an action will still be necessary. This might happen in case of a parol contract and alleged part performance. Matters are in fact placed in the same position as if there was a devise of the fee to trustees.

This s. not
required where
legal estate is
outstanding.

Where the legal estate is outstanding at the time of the vendor's death, the aid of this s. is not required. The person in whom it is outstanding can convey, and the personal representative can give a discharge for the purchase-money. This makes a complete title.

Does not apply
to tenant in
tail or copy-
holds.

The s. does not apply to a contract by a tenant in tail which by his death becomes incapable of being enforced. Nor does it apply to copyholds.

Estates *pur
autre vie*.

It applies, however, to an estate *pur autre vie* where it would devolve on the heirs general as special occupants, which is a *quasi* descent: Burton, pl. 731, *D. d. Hunter v. Robinson*, 8 Barn. & Cr. 296. If the executors or administrators take as special occupants the aid of this s. is not required. Leaseholds for lives devised in

settlement are usually vested in trustees, in which case also a conveyance can be made independently of this s.

The s. does not apply to the peculiar case of the vendor having a power of appointment which he does not exercise, the property being settled in default of appointment: see *Morgan v. Milman*, 3 D. M. & G. 24; Fry, Spec. Perf., 2nd ed., p. 68.

As to the "beneficial rights" mentioned in subs. 2, see Jarman on Wills, 4th ed., vol. I., pp. 55-6; *Re Thomas*, 34 Ch. D. 166. *will*.

SS. 4, 5.

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ACTIONS.

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Sale.

Discharge of Incumbrances on Sale.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason think fit to require a larger additional amount.

*Discharge of
Incumbrances
on Sale.*

Provision by
Court for in-
cumbrances,
and sale freed
therefrom.

This s. is confined to cases of sales only.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

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See *Patching v. Bull*, 30 W. R. 244; *Dickin v. Dickin*, *ib.* 887; *Milford &c. Co. v. Mowatt*, 28 Ch. D. 402; *Archdale v. Anderson*, 21 L. R. Ir. 527; *Seton*, 5th ed., pp. 1374, 1589.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

How applica-
tion to Court
made.

Facilities given
for sale of
encumbered
estates.

Costs of appli-
cation.

What in-
cumbrances
included.

Vendor not
compelled to
act on this s.

add:

See definition of incumbrance, s. 2 (vii.). Under s. 69, subs. 3, the application to the Court will be by summons; subs. 4, 5, and 6 provide for the notices to be given; subs. 7 provides for costs.

This s. greatly facilitates sales of encumbered estates, especially when taken in connection with ss. 15, 16, and 25. It applies to ordinary sales, as well as sales by the Court. Suppose the estate to be subject to a jointure or portions for younger children under age, and therefore not yet raisable, the owner could not sell free from the jointure unless the jointress consented to release, and must necessarily sell without any release of the portions and subject to depreciatory conditions as to indemnity, or leave them a charge to be allowed out of the purchase-money.

Under this s. and ss. 15, 16, and 25, the course will be simple. In the case of a sale by the Court the proper amount can be set aside out of the purchase-money when paid in. In the case of a sale out of Court, the owner can, when the contracts are signed, and on the faith of the incoming purchase-money, generally procure a temporary advance of the amount required to be paid into Court to answer the charges, and thus at once obtain a conveyance or vesting order (s. 5, subs. 2). By s. 69, subs. 7, the Court can direct by whom the costs of any application are to be paid.

A capital sum or an annuity payable out of rents and profits or a capital sum charged on a reversionary interest are within this s. (see s. 2 (vii.)). An annual sum, whether terminable or otherwise, charged on land, and a capital sum charged on a determinable interest in land, constitute the two cases where a capital sum could not be or might not properly be applied out of the proceeds of sale in discharge of the incumbrance. In the one case the annuitant is entitled to have payment of the annual sum continued to him, in the other case, capital money should not be applied in payment of the charge to the prejudice of the remainderman. Therefore this s. provides for the application of dividends in payment.

It seems that a vendor will not be compelled to make use of this s. for discharging an incumbrance—at least, where it would inflict

hardship on him: *Re Great Northern R. Co. & Sanderson*, 25 Ch. D. 788, where the learned judge seemed to think that the s. does not apply to a rent-charge created under the provisions of an Act of Parliament, *sed qu.*

It is conceived that any surplus income after paying the annual sum for keeping down interest on the principal sum should be paid to the vendor and not accumulated as an addition to the fund.

SS. 5, 6.

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Incumbrances
on Sale.

General Words.

General Words.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

General words
in conveyances
of land, build-
ings, or manor.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

See, on this subs., *Beddington v. Atlee*, 35 Ch. D. 317.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of

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General Words.

frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

See, on this sub., *Beddington v. Atlee*, 35 Ch. D. 317.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

Effect of con-
tracts un-
altered.

This s. does not enlarge the rights of a purchaser under his contract. If the vendor, before the Act, was not bound to give the purchaser all the appurtenances specified in the s., he can still limit his conveyance accordingly: *Re Peck and the School Board for London*, 1893, 2 Ch. 315.

Use of general
words as to
land or houses.

The object of inserting general words in a conveyance was to prevent any question as to whether a particular easement or right would or would not pass without those words. In most cases the words might be useless; still in some case they might be required, as, for instance, to pass reputed rights and easements. As a general rule in case of land and houses they merely express what is included in the description, or forms part and parcel of the land or houses, and the rights and easements appurtenant thereto, i.e. annexed by express or implied grant, and all these pass with the land or houses (Gale, 48; 63, 6th ed.; Williams Real P. 328, 12th ed.). But where an easement has become

extinct by unity of possession of the dominant and servient tenements, a conveyance of land or a house "with all easements therewith used and enjoyed," will operate as a grant *de novo* of the easement which, though at one time appurtenant, had been extinguished (*Barlow v. Rhodes*, 1 Cr. & M. 448; *Gale*, 48; 67, 6th ed.; *Williams Real P.* 329, 12th ed.). Even where no easement existed before the unity of possession, but a way was used with one tenement over the other, a grant of the first-mentioned tenement, "together with all ways now used or enjoyed therewith," would pass a right of way (*Barkshire v. Grubb*, 18 Ch. D. 616); and in some cases the result would be the same, even without any general words (*Brown v. Alabaster*, 37 Ch. D. 490, at p. 507; see also *Watts v. Kelson*, L. R. 6 Ch. Ap. 166; *Kay v. Oxley*, L. R. 10 Q. B. 360; *Baring v. Abingdon*, 1892, 2 Ch. 374, at pp. 390, 398-9, 402); but not as a general rule if the grant were only "with all ways appurtenant thereto" (*Harding v. Wilson*, 2 B. & C. 96; *Bolton v. Bolton*, 11 Ch. D. 970, 972; *Barlow v. Rhodes*, *ubi sup.*; *Brown v. Alabaster*, *ubi sup.*; *Thomas v. Owen*, 20 Q. B. D. 225). A conveyance after 1881 will similarly operate to pass reputed easements under this Act, without any express general words.

The general words used in a conveyance of a manor either (1) express what is included in the description as parcel of the manor (see *Shep. Touch.* 92), or (2) they are royal franchises, which if they are appurtenant to the manor pass without express words, but not otherwise (see *Morris v. Dimes*, 1 Ad. & El. 654).

Mines and minerals pass under a conveyance of land without being expressly mentioned, except in copyhold or customary assurances and except in conveyances to railway companies, from which latter they are excepted unless expressly mentioned (see 8 & 9 Vict. c. 20, s. 77). They are therefore omitted from the general words which by this section are made applicable to land and houses, but are included in the general words applicable to manors, as they may in some cases have become severed from the manor, and once severed could not be reunited to it as they might be to the surface of land when both become vested in the same owner. It may be a question whether an enfranchisement of copyholds by conveyance of the fee simple reserving the minerals would not operate as a severance.

SS. 6, 7.

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General Words.
Easements used
or enjoyed with
but not appur-
tenant to land.

General words
as to manors.

Mines and
minerals.

Covenants for Title.

Covenants for
Title.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-

Covenants for
title to be
implied.

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Covenants for Title.

matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say :

Covenant need not be expressed to be for heirs, &c.

This clause should be read in connection with s. 64, making singular include plural and plural singular in implied covenants. S. 59, subs. 2, and subs. 6 of this section render it unnecessary to provide expressly that the covenant shall be by the conveying party "for himself, his heirs, executors, or administrators," or that it shall be with the "heirs and assigns" of the party to whom the conveyance is made. As regards acts to be done under the covenant, when made with two or more, this s. should be read with s. 60, subs. 2.

Joint and several covenants, how implied.

Therefore when "A. and B. as beneficial owners hereby convey," it is implied that "A. and B." (plural, s. 64) "hereby for themselves, their heirs," &c. (s. 59 (1) (2)), "covenant," that is, they give a joint covenant. When "each of them A. and B. as beneficial owner hereby conveys," it is implied that "each of them hereby for himself, his heirs," &c. (s. 59 (1) (2)), "covenants," that is, each gives a several covenant. Where they convey in both modes they give joint and several covenants. Again, in the covenant for further assurance the words "at the request and cost of the person," &c., where the conveyance is to several jointly, include "persons" (s. 64) and the survivors or survivor of them, and the person on whom the right to sue on the covenant devolves (s. 60 (1) (2)).

Covenant applies to subject expressed to be conveyed.

The covenant of a conveying party is implied "as regards the subject-matter or share of subject-matter *expressed* to be conveyed by him." It is not material that he actually has anything to convey; he may be made in terms to convey simply for the purpose of giving an implied covenant. Therefore, in the case of a conveyance by tenant for life and remainderman if they both convey as beneficial owners a covenant will be implied by both as to the whole fee, joint or several or both, according to the mode in which they convey.

By tenant for life and remainderman.

So also in a conveyance by tenant for life, and remainderman for life, or in tail or in fee, or by joint tenants, or tenants in common, there can be implied covenants joint or several or both, as to the entirety or part, as may be required.

Conveyance by one to himself and another.

Where the conveyance is by one to himself jointly with another—as it might be under s. 50, or under 22 & 23 Vict. c. 35, s. 21—it seems doubtful if any implied covenant can be given: see *Moffatt v. Van Millingen*, 2 Bos. & P. 124, note (c); *De Tastet v. Shaw*, 1 B. & A. 664; *Rose v. Poulton*, 2 B. & Ad. 822; *Faulkner v. Lowe*, 2 Ex. 595; *Beecham v. Smith*, E. B. & E. 442.

Covenants applicable to all property.

The covenants in this s. are applicable to property of all kinds, including policies of assurance, reversionary interests in personal estate,

choses in action, and personal chattels : see the definition of conveyances, s. 2 (v.).

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned,

S. 7 (A).

SALES AND
OTHER TRANS-
ACTIONS.

*Covenants for
Title.*

On conveyance
for value, by
beneficial
owner.

Right to con-
vey.

Quiet enjoy-
ment.

Freedom from
incumbrance.

S. 7 (A).

SALES AND
OTHER TRANS-
ACTIONS.*Covenants for
Title.*Further assur-
ance.

or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

How conveying
party to be
described.

The meaning of subss. 1-4 is that the actual words of conveyance must describe the conveying party as "beneficial owner," or "settlor," or otherwise (as intended): see the 4th Sch. to the Act, Forms I., III., and IV. It is not sufficient to recite the nature of his ownership, or object of the deed, and then for him to convey simply. He must be expressed to convey as "beneficial owner," "settlor," or otherwise as the case may require.

It is not necessary, in order that a conveyance may operate under this s., to use the word "convey" or "conveyance." These words include all the operative words "assign," &c., ordinarily used, see s. 2 (v.), and may be used instead of the word "grant," see s. 49 and the schedules to this Act where "convey" is used to pass a fee simple, and s. 57 which enacts that deeds using expressions to the like effect as in the 4th schedule shall be sufficient. Accordingly it is immaterial what word is used; in a conveyance in fee "grant" may be used; in a conveyance under a power "appoint" may be used; and in the case of personal estate "assign" may be used, all these words being equally capable of attracting the covenants in this section.

The expression "purchase for value" is not to include a conveyance in consideration of marriage for the reason that the covenant E, *infra*, by a settlor is a limited covenant. Therefore a person deriving title under a marriage settlement should covenant as to the acts of the settlor in the same manner as he would covenant for the acts of his ancestor if he were conveying as heir at law.

A voluntary conveyance (if it be not a settlement to which covenant E is made applicable) still requires an express covenant, if any is intended to be given, but in most cases no covenant would be given.

If A. takes by conveyance on a sale by B., who takes under a settlement, voluntary or otherwise, made by C., then B. derives title "otherwise than by purchase for value" through C., and in the conveyance by B. to A. the implied covenant by B. would extend to the acts of C. But A. does not derive title "otherwise than by purchase for value" through B. and consequently not through C., and on a conveyance by A. his implied covenant would extend only to his own acts. This appears clear if we consider that, assuming the settlement voluntary, C. could defeat it by conveyance for value before A.'s purchase but not afterwards. The implied covenant therefore extends back only to acts subsequent to the last conveyance for value not being a settlement.

The words of qualification, "notwithstanding anything," &c., control all four branches of the covenant: *David v. Sabin*, 1893, 1 Ch. 523.

"Omitted": see *David v. Sabin*, *ubi sup.*

As to the vendor's liability for the acts or defaults of persons claiming under him, see *David v. Sabin*, *ubi sup.*

Notice to the purchaser, by mention in the conveyance or otherwise, of defects of title, is not enough to absolve the vendor from liability under the covenants for title: see *Page v. Midland Railway Co.*, 1894, 1 Ch. 11, over-ruling *Hunt v. White*, 37 L. J. Ch. 326.

Covenant (A) does not apply to money due for paving expenses, where it is only recoverable from the owner personally, and is not a charge upon the land: *Egg v. Blayney*, 21 Q. B. D. 107; *Re Bettessworth & Richer*, 37 Ch. D. 535.

S. 7 (A), (B).

SALES AND
OTHER TRANS-
ACTIONS.

Covenants for
Title.

Word "con-
vey" not
necessary.

Any operative
word sufficient.

"Purchase for
value."

Covenants in
voluntary
conveyance.

How far back
covenant
extends.

Qualification
of covenant.
"Omitted."

Person claim-
ing under the
vendor.

Conveyance,
subject to
incumbrances.

On conveyance
of leaseholds
for value, by
beneficial
owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following

S. 7 (B), (C).

SALES AND
OTHER TRANS-
ACTIONS.

*Covenants for
Title.*

Validity of
lease.

further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsundered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On assignment of leaseholds express covenant by purchaser still required.

On surrender of leaseholds, express covenant still required.

The Act does not provide for the covenant of indemnity against rent and covenants by a purchaser on the assignment of leaseholds. The circumstances differ so much that a general covenant could not easily be framed. Moreover the purchaser does not always execute the deed.

It would seem that, in a surrender of a lease, there should be either an express covenant by the person who conveys, or an exclusion, under subs. 7, of the covenant implied under clause (B.), which assumes the existence of a landlord standing aloof as a third party.

The case of *David v. Sabin*, cited on covenant (A), shows the need of taking a covenant on a surrender.

On mortgage by beneficial owner.

Right to convey.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is

expressed to be conveyed ; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made ; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made ; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will, from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so

S. 7 (C).

SALES AND
OTHER TRANS-
ACTIONS.

*Covenants for
Title.*
Quiet enjoy-
ment

Freedom from
incumbrance.

Further assur-
ance.

S. 7 (C), (D),
(E).

SALES AND
OTHER TRANS-
ACTIONS.

*Covenants for
Title.*

Bill of Sale.
On mortgage
of leaseholds
by beneficial
owner.

Validity of
lease.

Payment of
rent and per-
formance of
covenants.

On settlement.

expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

Covenant (C) inserted in a Bill of Sale makes it void : *Ex parte Stanford*, 17 Q. B. D. 259.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance ; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them :

(E.) In a conveyance by way of settlement, the follow-

ing covenant by a person who conveys and is expressed to convey as settlor (namely):

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

S. 7 (E), (F).

SALES AND
OTHER TRANS-
ACTIONS.

Covenants for
Title.

For further
assurance,
limited.

It is conceived that "a conveyance by way of settlement" need not, to come within this subs., contain limitations by way of succession; but that it is enough if it disposes of property for the benefit of some other person or some corporation: compare *Re Player*, 15 Q. B. D. 682; *Re Vansittart*, 1893, 1 Q. B. 181, decisions on s. 47 of the Bankruptcy Act, 1883.

The old practice in settlements was for the settlor to give the ordinary vendor's covenants for title. This can still be done, where the settlement is "a conveyance for valuable consideration," by making him convey as beneficial owner instead of as settlor, and so incorporating covenant (A). The old practice is inconvenient. If a charge be suppressed or accidentally overlooked, the trustees on discovering it become bound to sue the settlor. The amount to be recovered might be such as to leave him penniless and make proceedings in bankruptcy necessary. This cannot be for the benefit of the wife or family, and is an obligation which should not be imposed on trustees. There should be either no covenant for title, or at most this limited covenant (E), which binds the settlor, purporting to convey the fee simple, to bar an estate tail (see *Davis v. Tollemache*, 2 Jur. N. S. 1181, 1185; *Bankes v. Small*, 36 Ch. D. 716), or execute a valid appointment under a power, or do any other like act for confirming the settlement, but does not throw on him any obligation to discharge incumbrances created before the settlement: compare *Re Jones*, 1893, 2 Ch. 461.

Covenants in
settlements,
old practice
as to.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as

On conveyance
by trustee or
mortgagee.

S. 7 (F).
 SALES AND
 OTHER TRANS-
 ACTIONS.

Covenants for
 Title.

Against in-
 cumbrances.

trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Covenant by
 outgoing
 trustee.

On a change of trustees the covenant against incumbrances of an outgoing trustee is now of less importance than it was: any wrongful incumbrance being a breach of trust for which there is a remedy independently of the covenant. Before the Act 32 & 33 Vict. c. 46, the covenant was useful as making the breach of trust a specialty debt having a priority: see *Holland v. Holland*, 4 Ch. App. 449; nor is it quite useless, for that purpose, even now: see n. to s. 59, *infra*. It also, in regard to T. A., 1888, s. 8, leaves more time for an action to be brought against the trustee.

"Party or
 privy."

"Party or privy": see, on the force of these words, *Hobson v. Middleton*, 6 B. & C. 295; *Clifford v. Hoare*, L. R. 9 C. P. 362; Sugden, V. & P., 14th ed., pp. 603-4.

"Privy."

The word "privy" does not mean "having knowledge" (which would make the covenant to a great extent an absolute covenant for title), but means participation in some act so as to be bound thereby: see, per Tindal, C.J., *Woodhouse v. Jenkins*, 9 Bingh. 441; *Thorne v. Heard*, 1894, 1 Ch. 606; Century Dict. tit. "Privy."

On conveyance
 by direction
 of beneficial
 owner.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

Under subs. 1 the covenant implied on the part of any person

conveying relates to what he himself conveys. Under this subs. the covenant implied on the part of the person directing applies to what another conveys by his direction. The same result would be attained by making him convey by way of confirmation as beneficial owner.

This subs. is intended to apply to a case like that of a sale by trustees under a power by the direction of the tenant for life. Since the S. L. A., 1882, the tenant for life will generally be himself the vendor. The old practice was to make the tenant for life covenant generally as if he were a vendor seised in fee. Latterly the practice has been to confine his covenant to his life estate only (see Dart, V. & P. 620, 6th ed.; 2 Dav. Conv. 261 (c), 4th ed.), and a proviso so limiting the covenant and operating under subs. 7 of this s. should be added.

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OTHER TRANS-
ACTIONS.

Covenants for
Title.

Old practice as
to covenants
by tenant for
life.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

Implied cove-
nants in con-
veyance by
husband and
wife.

The object of this subs. is to enable covenants on the part of the husband to be incorporated where husband and wife convey.

The wife may convey with consent of the husband, the husband not conveying. Then the covenant is by the wife only, to the effect that notwithstanding anything done by her, &c., or any one through whom she derives title otherwise than, &c. But the general practice is for the wife to convey, and the husband also to convey and to confirm. In that case the wife and the husband should each be expressed to convey as beneficial owner; then, within this subs., she will be deemed to convey by the direction of her husband as beneficial owner, and the three following covenants will be implied:—(1) by the wife as beneficial owner binding, (a) if the conveyance is made before 1883, her present separate property, which she is not restrained from anticipating: see *Pike v. Fitzgibbon*, 17 Ch. D. 454; (b) if the conveyance is made after 1882, but before the 6th of December, 1893, and if she has any such separate property (but not otherwise: see *Palliser v. Gurney*, 19 Q. B. D. 519; *Stogdon v. Lee*, 1891, 1 Q. B. 661) such present separate property, and also her future separate property which she is not restrained from anticipating (see M. W. P. A., s. 1, (3), (4), s. 19) so long as she is not discover: see *Pelton Brothers v. Harrison*,

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Covenants for
Title.

1891, 2 Q. B. 422; and (c) if the conveyance is after the 5th of December, 1893 (see M. W. P. A., 1893), all her present separate property and, whether she has any present separate property or not, all her future separate property, and all property she may own while discover, but without prejudice to any restraint on anticipation; (2) by the husband as beneficial owner; and (3) by the husband in the same terms as the covenant implied on the part of the wife, that is in effect, that notwithstanding anything done by her or by any one through whom she derives title otherwise than, &c.

A married
woman con-
veying under
a power.

Where a married woman conveys under a power she and her husband may in like manner each be expressed to convey as beneficial owner, then the three covenants above mentioned will be implied. The second of those covenants (being the first of the husband's covenants) will not be of importance, but his second covenant corresponds with the usual one entered into by him in similar cases independently of this Act.

As to wife's
property
acquired after
1882.

Where the wife, married before 1883, conveys as beneficial owner property acquired by her after 1882, the concurrence of her husband is no longer necessary, as he takes no interest, and she disposes of it as a *feme sole* (M. W. P. A., s. 5); nor for the same reason is it necessary as to any property of a woman married after 1882, *ib.* s. 2.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

A conveyance can still be drawn in the old form. The character in which the conveying party conveys should then not be stated, and covenants can be inserted in express words.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

Covenant to
surrender may
incorporate
covenant.

By s. 2 (v.) "conveyance" includes a covenant to surrender. The statutory covenants contained in this s. may therefore be incorporated in the deed of covenant, but they cannot be incorporated in the surrender unless it is under seal. They may also be incorporated in all

cases where customary or copyhold lands can be dealt with as freeholds, for instance, where they pass by bargain and sale under a power in a will, or by deed and admittance by virtue of the S. L. A., 1882, or otherwise, or where an equity is conveyed.

A demise by way of lease implies in law an absolute covenant for quiet enjoyment. The usual limited covenant inserted in a lease displaces this implied covenant, and is in effect not a covenant but a limitation of the covenant implied by law: see *Clayton v. Leech*, 41 Ch. D. 103; *Harrison v. Muncaster*, 1891, 2 Q. B. 680; *Kelly v. Rogers*, 1892, 1 Q. B. 910.

S. 7.
—
SALES AND
OTHER TRANS-
ACTIONS.

—
Covenants for
Title.

—
Covenant in a
lease.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

This subs. makes all covenants implied under this s. run with the land so as to be enforceable by every person interested under the conveyance, as to whose rights, see *David v. Sabin*, 1893, 1 Ch. 523, 536-7, 540-1, 545-6. It precludes any difficulty as to what covenants do or do not run with the land, as to which see note to s. 58. An implied covenant under this s. will therefore be more valuable than the ordinary covenant, on the right to which see *Browning v. Wright*, 2 B. & P. 13; *Church v. Brown*, 15 Ves. 258. *and*.

Benefit of
implied cove-
nants in this s.
to run with
the land.

See further as to covenants, ss. 58-60 and 64.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

This subs. enables provisions to be inserted modifying the statutory covenant in any agreed manner. As so modified it will be equivalent in effect, for the purpose of running with the land and otherwise, to the simple statutory covenant. A proviso now generally used limiting the covenants for title by a tenant for life is an example of a variation under subs. 7, and is a valid proviso and not repugnant to the covenant: see *Williams v. Hathaway*, 6 Ch. D. 544.

Variation of
statutory
covenants may
be made.

(8.) This section applies only to conveyances made after the commencement of this Act.

SS. 8, 9.

SALES AND
OTHER TRANS-
ACTIONS.

*Execution of
Purchase Deed.*
Rights of pur-
chaser as to
execution.

Execution of Purchase Deed.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this Act.

The s. precludes the questions raised in *Viney v. Chaplin*, 4 Drew, 237, 2 D. & J. 468; *Essex v. Daniel*, L. R. 10 C. P. 538; and *Ex parte Swinbanks*, 11 Ch. D. 525. See notes to s. 56.

*Production and
Safe Custody of
Title Deeds.*

Acknowledg-
ment of right
to production,
and under-
taking for safe
custody of
documents.

Production and Safe Custody of Title Deeds.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise

becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

It is conceived that where a mortgagor gives an acknowledgment to his mortgagee, it is unnecessary to vary (under subs. 13, *infra*) the provision made by this subs. as to costs and expenses, by expressly giving them to the mortgagee, or adding them to his security. The mortgagee, though liable, in case the deeds get into other hands, to pay the costs and expenses in the first instance, would be entitled to add them to his security as against the mortgaged property, on general principles, if the specific performance of the obligation was required for the purposes of his security: see *National Provincial Bank of England v. Games*, 31 Ch. D. 582.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the

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Mortgagor and
mortgagee.

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Legal right to
production
assimilated to
the equitable
right.

Effect of s. 9.

No liability to
damages where
acknowledg-
ment only
given.

Acknowledg-
ment substi-
tuted for
covenant to
produce.

documents to which it relates, from whatever cause arising.

This s. removes certain difficulties as to covenants for production running with the land, and makes the legal right to production co-extensive with the equitable right (as to which, see *Fain v. Ayers*, 2 Sim. & St. 533, Dart, ch. ix., s. 2, p. 473, 6th ed.). Also it removes the personal liability of the original covenantor after he has parted with the documents, and transfers that obligation to each subsequent possessor, but for the period only of his possession. This personal liability has sometimes compelled a covenantor to retain documents after he had ceased to be interested in any land affected by them, or else to incur the expense of obtaining, and of procuring the covenantee to accept, a substituted covenant. A person retaining documents is now enabled to give (1) an acknowledgment of the right of production, and (2), an undertaking for safe custody, together or separately. The first, unlike a covenant to the same effect, may safely be given by a trustee or mortgagee. He can always produce the documents while he has possession of them, and he ceases to be liable after he has parted with them. He should only give the acknowledgment and not the undertaking: see n. to subs. 14. An ordinary vendor will be liable to give both in the absence of special contract. As to the right of the vendor to retain documents, see V. & P. A., s. 2, r. 5.

Subs. 6 expressly excludes all liability to damages for loss or destruction where an acknowledgment only is given. The liability for damages arises only upon an undertaking under subs. 9.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

Where by general law, and in the absence of special contract, a person would be bound to give a covenant for production and delivery of

copies (as to which see Sug. V. & P., 14th Ed., Ch. 11, s. 6, and *Cooper v. Emery*, 1 Ph. 388), subs. 8 enables him to give an acknowledgment in place of the covenant, but does not compel him to do so. He still has the option of giving a covenant, an option not likely to be exercised, as the covenant creates a more onerous liability. This s. applies only to liabilities respecting documents incurred after 1881: see subs. 14.

Where a conveyance is made to uses the acknowledgment should, like the old covenant for production, be made to the grantee to uses. The persons interested under the limitations will then, as "claiming any estate, &c., through" that grantee (see subs. 3) be entitled to the benefit of the acknowledgment.

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—
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Where convey-
ance made to
uses.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

This subs., as compared with the ordinary covenant for production, operates as a relief to the person bound to produce. It makes him liable for damages only while the documents are in his possession. On the other hand, it imposes an additional liability on any person afterwards acquiring possession of the documents, making him liable in damages for loss or destruction, a liability not necessarily devolving on him under the ordinary covenant merely by reason of his receiving the documents from a person who had covenanted for safe custody.

Liability under
undertaking is
on possessor
only.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct any inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

An application to the Court under this subs. or under subs. 7 should be by summons: see s. 69 (3).

Application
under acknow-
ledgment or
for damages,
how made.

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loss of deeds.*

As to the question of damages, see *Hornby v. Matcham*, 16 Sim. 325, and *Brown v. Sewell*, 11 Hare, 49. In *James v. Rumsey* (11 Ch. D. 398) the mortgagor was held entitled to an indemnity, but not to compensation.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

See note to subs. 8.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

Whether trustees should give undertaking.

The covenant for production of documents intended to be superseded by this s. imposed two obligations, (1) an obligation to produce, (2) an obligation to keep safe. The first could be enforced by specific performance, but the remedy on the second was damages only. The old practice was that a trustee selling did not give any covenant. Latterly it has been customary for him to give a covenant limited so as to bind himself personally while having possession of the documents, and so as to bind the same, so far as may be, in the hands of other persons, "but so as not to create any further liability," or "so as not to create any liability for damages." With this limitation inserted it is conceived that the part of the covenant as to safe keeping should have been omitted, the limitation of liability being repugnant and void (*Williams v. Hathaway*, 6 Ch. D. 544); but this does not seem always to have been attended to in the precedent books. However this may be, the general rule is that a trustee does not covenant except for his own acts, and ought not to be asked to guarantee the safety of documents which might be lost without his personal neglect, as, for instance, by his solicitor on a journey, when properly removing them. In this view trustees ought only to give an acknowledgment under

this s. and not an undertaking. If they give an undertaking any damages incurred could not, it is apprehended, in the absence of special provision, be recouped to them out of the part of the trust estate retained: see, however, on the question whether trustees should give the undertaking as well as the acknowledgment, 37 Solicitors' Jour., pp. 4, 73 78. But on purchase of an estate with deeds bound by an undertaking, the liability would be one attached by law to the estate, and in a proper case the trustees would be entitled to be recouped any loss. The same principle applies to mortgagees.

The old practice was to take the covenant for production of documents by a separate deed, and not to include it in the conveyance. On subsequent dealings it was kept off the abstract, and no opportunity was given for making requisitions as to the documents mentioned in the covenant. Having regard to the Act, 22 & 23 Vict. c. 35, s. 24, it is conceived that a solicitor cannot now safely omit giving an abstract of a document of even date with the conveyance commencing a title.

Under the C. A., s. 3 (3), when a conveyance becomes a root of title any requisition as to prior documents is precluded, and there is therefore no special reason for giving an undertaking by a separate writing unless the schedule of documents would make the conveyance inconveniently long, but it seems best so to give it, and if so given it can be destroyed when production has ceased to be of importance.

A separate writing, under hand only, should bear a sixpenny agreement stamp. Though not a document clearly included in the Stamp Act, it might be held to be in effect an agreement.

An acknowledgment and undertaking being substituted for a covenant the expense will be borne by the person who would pay for the covenant, but, besides the stamp, the expense will in any case be no more than the mere cost of making out a schedule of documents.

The liability of a person giving an acknowledgment or undertaking ceases when the documents are delivered over, and attaches to the person receiving them. Therefore no indemnity need be taken on delivery over, but it is conceived that they must be properly delivered over, that is to say, to a person having an interest in the property to which they relate.

The acknowledgment or undertaking must be given by a person who retains the documents, i.e. who actually has possession of them. Therefore where, as sometimes happens on a sale of property in mortgage, the mortgagor and mortgagee are required to place themselves under an obligation for production, the obligation by the mortgagee being limited to the period during which he has possession, he alone can give an acknowledgment. The mortgagor does not retain the deeds, and his obligation is, not to produce, but to procure production, and, if required, must be provided for by covenant in the old form. It is wrong to make the mortgagor in such a case give an undertaking for safe custody. His undertaking has no operation under this Act. It operates as an unqualified ordinary contract for safe custody, and renders him liable for loss or destruction of the deeds after he has

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Acknowledgment or undertaking may be included in the conveyance.

Stamp on an acknowledgment or undertaking.

Expense, by whom to be borne.

No indemnity required on delivery over.

S. only applies to persons actually having possession of documents.

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Production by
mortgagee.

Custody of
deeds by
equitable
tenant for life.
LEASES.

Rent and bene-
fit of lessee's
covenants to
run with
reversion.

ceased to have any interest in them, and the person to whom it is given has not the benefit of subs. 10 of this s.

Under s. 16, *infra*, a mortgagee, under a mortgage made after 1881, is bound to produce the deeds in his custody or power to any person entitled to redeem, and to permit him to take copies or abstracts.

As to the terms on which an equitable tenant for life, as between himself and his trustees, is entitled to custody of title deeds, see *Re Burnaby*, 42 Ch. D. 621; *Re Wythes*, 1893, 2 Ch. 369; *Re Newen*, 1894, 2 Ch. 297.

III.—LEASES.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

Beneficial
owner as well
as legal rever-
sioner entitled
to sue.

This s. gives to the "person entitled to the income," that is, the beneficial owner, as well as the legal reversioner, the right to sue. It also gives a mortgagee the right to sue on the lessee's covenants in a lease made under s. 18 of this Act by the mortgagor: *Municipal, &c., Building Soc. v. Smith*, 22 Q. B. D. 70.

As to some of the difficulties provided against by this s. see *Greenaway v. Hart*, 14 Com. B. 340; *Yellowly v. Gower*, 11 Exch. 274.

As to the right of one tenant in common of the reversion to sue alone, see *Roberts v. Holland*, 1893, 1 Q. B. 665.

And as to apportionment of rent and covenants on severance of the reversionary estate, by assignment or surrender, see *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48; *Baynton v. Morgan*, 21 Q. B. D. 101, and on appeal, 22 Q. B. D. 74. These cases seem to lead to the conclusion that where the reversion is severed and the rent is properly apportioned the lessee is legally bound by such apportionment though he has not assented, and then s. 12, *post*, apportions the condition of re-entry.

As to the cases in which the benefit of covenants by lessees ran with the reversion prior to this Act, see *Spencer's Case*, and notes, 1 Smith, L. C. 65, 72, *et seq.*, 9th ed.

SS. 10, 11.

LEASES.

And as to the case of the grant of a mere easement for a term, see *Martyn v. Williams*, 1 H. & N. 817; *Hooper v. Clark*, L. R. 2 Q. B. 200.

Lease of easement.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

Obligation of lessor's covenants to run with reversion.

(2.) This section applies only to leases made after the commencement of this Act.

This s. makes legally binding on the successors in title of a person who grants a lease under a power, all covenants which, as against the remainderman, the grantor has power to enter into; see *Wilson v. Queen's Club*, 1891, 3 Ch. 522, where, however, this s. was not expressly referred to.

Lessor's covenants in leases under powers.

As to the cases in which the obligation of covenants by lessors ran with the reversion before this Act, see *Spencer's Case*, and notes *ubi sup.* As to the obligation of covenants running with the land, generally, see note to s. 58.

This s. necessarily does not apply to cases where the covenants are not severable in their nature, or are not attributable to particular parts of the demised property.

The two preceding ss. effect a considerable extension of the principle of the Act 32 Hen. 8, c. 34, whereby the benefit of a covenant was annexed to the reversion. In order to be within that Act, the covenant must have been entered into with the owner of the legal reversion, so that in a lease under a power reserved to the mortgagor by the mortgage deed, a covenant by the lessee with the mortgagor did not run, but was a covenant in gross, the mortgagor not being the legal reversioner. But the Act 8 & 9 Vict. c. 106, s. 5, enabled the lessee

Principle of 32 Hen. 8, c. 34, extended to leases binding the legal reversioner.

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to covenant with the mortgagee though not a party to the lease, so that a covenant properly framed, that is with the mortgagor "and other the person entitled to the reversion," would after that Act run with the legal reversion. Now, under s. 10 of this Act, wherever there is a legal reversion, that is, where a lease is made by means of an ordinary power or a statutory power as under s. 18 of this Act, or under the S. L. A., 1882, enabling a legal term to be carved out of the reversion, the lessee's covenants, whether so expressed or not, are annexed to and run with the reversion, and are no longer covenants in gross.

So under s. 11 the covenants of a lessor who has power to bind the reversionary estate, will run with it, and bind the reversioner, though the lessor be tenant for life only, or, as mortgagor, be entitled only to an equitable interest.

Where a mortgagor, not having power to bind the mortgagee, grants a lease, no legal term is created, and there being consequently no reversion, ss. 10, 11, and 12 do not apply. If, however, the mortgagee reconvey to the mortgagor, the lease becomes good by estoppel; and if both convey to a purchaser, the result is the same: see notes to *Spencer's Case*, 1 Smith, L. C. 106-9, 9th ed.; *Webb v. Austin*, 7 M. & Gr. 701; *Sturgeon v. Wingfield*, 15 M. & W. 224; *Cuthbertson v. Irving*, 6 H. & N. 135.

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

Application of this s.

The 22 & 23 Vict. c. 35, s. 3, provides in favour of an assignee (but not of the lessor), for the apportionment of conditions of re-entry where the reversion upon a lease is severed, and the rent or other reservation

is legally apportioned. This s. of the present Act provides for the apportionment of every condition in a lease, which is in its nature apportionable, and includes the case of the avoidance or cesser in any manner of the term granted by the lease as to part only of the land comprised therein. As to the old law, see Brooke's Abridgment "Conditions," 193; *Winter's Case*, Dyer, 308 b.; *Britman v. Stanford*, Owen, 41.

SS. 12, 13, 14.

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13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

On sub-demise title to leasehold reversion not to be required.

(2) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

This s. is supplementary to s. 3 (1), and to the V. & P. A., s. 2, r. 1.

The effect of this s., together with s. 2, r. 1, of the V. & P. A., on a contract to grant a lease, is as follows:—

By the V. & P. A., under a contract to grant a lease for a *term of years*, the intending lessee—

What title to be shown by leaseholder selling or leasing.

(1) Cannot, whether the intending lessor be freeholder or leaseholder, call for the title to the freehold,

(2) But can, if the intending lessor be a leaseholder, call for his lease and the title thereto.

By the above s. 13 the intending lessee

(3) Cannot, where the intending lessor holds by under-lease, call for the title of the superior leasehold reversion on such under-lease.

In contradistinction to a freeholder, the leaseholder is still left under liability to show his own lease and the title thereto. This is in accordance with the usual practice, though probably a lessee at a rack rent seldom calls for his lessor's title: see *Clayton v. Leech*, 41 Ch. D. 103, 106, 106. The freeholder almost invariably bars himself from showing his own title on granting a lease, but a leaseholder does not generally do so.

Forfeiture.

Forfeiture.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforce-

Restrictions on and relief against forfeiture of leases.

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C. A., 1892.	This s. must be read with C. A., 1892, ss. 2-5. As to service of notice, see s. 67.
Contents of notice.	It seems not necessary that the notice should give a minute specification of the items of breach. It should merely point out generally what is the breach. Thus, in case of a covenant to "repair, maintain," &c., it would be sufficient to state that the lessee has "not repaired, maintained," &c., following the words of the covenant. But the notice should give sufficient details where necessary in order that the matter in dispute may be remedied without resort to the Court: Woodfall, L. & T. 330, 13th ed.
Assignee of lease.	An assignee of a lease is entitled to the benefit of this s. (<i>Cronin v. Rogers</i>, 1 Cab. & Ell. 348), but not an under-lessee as against the superior landlord: <i>Burt v. Gray</i>, 1891, 2 Q. B. 98; <i>Cresswell v. Davidson</i>, 56 L. T. 811: see now, however, C. A., 1892, s. 4.
Agreement for a lease.	This s. does not apply to an agreement for a lease where there is no present title to specific performance (<i>Ayling v. Mercer</i>, W. N., 1885, p. 166; <i>Swain v. Ayres</i>, 20 Q. B. D. 585, 21 <i>ib.</i> 289; <i>Coatsworth v. Johnson</i>, 55 L. J. (Q. B. D.) 220); but it does apply where there is such a title: <i>Swain v. Ayres</i>, 21 Q. B. D. at pp. 292-3; <i>Lowther v. Heaver</i>, 41 Ch. D. 248, pp. 260, 261; <i>Strong v. Stringer</i>, W. N., 1889, p. 135; and see C. A., 1892, s. 5.
Service of notice.	A notice under this s. is sufficiently served on an assignee if addressed to the original lessee and all others whom it may concern and served on the occupier: <i>Cronin v. Rogers</i>, 1 Cab. & Ell. 348; and see s. 67, <i>infra</i>.
Informal notice.	In <i>North London Land Co. v. Jacques</i>, 32 W. R. 283, W. N., 1883, 187, the lessor's notice was informal in not requiring the lessee to remedy the breach, and though judgment had been actually recovered in an undefended action against the equitable mortgagees of the lessee, they were held entitled to relief; but see <i>Lock v. Pearce</i>, 1893, 2 Ch. 271, where it is held that if the lessor does not want compensation, he is not bound to ask for it.
Amount and recovery of compensation. Surveyor's charges.	The compensation claimed is measured by the breach, only where the breach cannot be remedied. No separate remedy is given for recovering the compensation claimed, so that a landlord giving notice to repair under a covenant to repair cannot under this s. recover his

surveyor's charges or his solicitor's costs (see *Skinnners' Co. v. Knight*, 1891, 2 Q. B. 542), and if the notice is complied with there is no breach of covenant; but see now C. A., 1892, s. 2.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

"The Court," i.e. the High Court: see *Lock v. Pearce*, 1893, 2 Ch. 271. "The Court."

If the lessor's action is in the Q. B. D., the lessee can apply in that action, notwithstanding s. 69 (1): *Cholmeley's School v. Sewell*, 1893, 2 Q. B. 254. Lessee's action.

If there is no action by the lessor, the lessee's application must be by action instituted by writ, not by originating summons: *Lock v. Pearce*, *ubi sup.*

The tenant can only obtain relief under this s. before the landlord has re-entered (*Quilter v. Mapleson*, 9 Q. B. D. 675, 676; *Rogers v. Rice*, 1892, 2 Ch. 170); but if he has applied for relief before re-entry, that is enough (*Lock v. Pearce*, 1892, 2 Ch. 328); and it seems doubtful if he can recover damages: see *Coatsworth v. Johnson*, 55 L. J. (Q. B. D.) 220. Relief was refused in *Ebbets v. Booth*, 27 Sol. J. 618, and *Scott v. Brown*, W. N., 1884, 209; see also *Lock v. Pearce*, *ubi sup.* It was granted upon terms in *Quilter v. Mapleson*, *ubi sup.*; in *North London Land Co. v. Jacques*, 32 W. R. 283, W. N., 1883, 187; in *Bond v. Freke*, W. N., 1884, 47; and in *Mitchison v. Thomson*, 1 Cab. & Ell. 72. Relief.

Before this Act no relief could have been obtained against the right of re-entry for breach of covenant in a lease, except in the case of a covenant for payment of rent (*Hill v. Barclay*, 18 Ves. 56; *Bracebridge v. Buckley*, 2 Price, 200; *Nokes v. Gibbon*, 3 Drew. 681); or except in cases of accident or surprise (*Hill v. Barclay*, 18 Ves. 62); or under special circumstances enabling a Court of Equity to grant relief: *Bamford v. Creasy*, 3 Giff. 675; *Bargent v. Thomson*, 4 Giff. 473; *Hughes v. Metrop. R. Co.*, 2 App. Cas. 439; *Barrow v. Isaacs*, 1891, 1 Q. B. 417. Under 22 & 23 Vict. c. 35, ss. 4-9, Courts of What relief before this Act.

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LEASES.

Forfeiture.

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S. 14.

LEASES.

Forfeiture.

How damages
are to be
ascertained.

Equity had power to grant relief in certain cases of forfeiture for omission to insure against fire. That power was extended to Courts of Common Law by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 2. These enactments are repealed by this Act (see subs. 7 of this s.); but by subs. 8 the relief against forfeiture for non-payment of rent, which extends to an under-lessee (*Doe v. Byron*, 1 Com. B. 623), is left untouched. As to this relief at common law, see the C. L. P. Act, 1852, 15 & 16 Vict. c. 76, s. 212, and the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 1.

The Act gives no guide for estimating the penalty to be imposed on the lessee. Where there has been a breach of a covenant to insure, but no loss, it is difficult to say what sum should be paid to the landlord. The probability is that the only penalty will be costs: see *Quilter v. Mapleson*, 9 Q. B. D. 678.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

See also C. A., 1892, s. 5.

Sub-lessee's
right to
relief.

An under-lessee has under this s. no right to relief against the superior landlord: see *Nind v. Nineteenth Century Building Society*, 1894, 2 Q. B. 226—approving *Burt v. Gray*, 1891, 2 Q. B. 98; *Cresswell v. Davidson*, W. N., 1887, 86; 56 L. T. 811. In *Doe v. Byron*, 1 Com. B. 623 (which was not cited in either of the three last mentioned cases), it was held that an under-lessee was a “tenant” within the remedial clause against ejectment for non-payment of rent, in 4 Geo. 2, c. 28, s. 4; but see now C. A., 1892, s. 4.

(4.) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could

subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

See now C. A., 1892, s. 2 (2), (3), as to forfeiture on bankruptcy or taking in execution; s. 3 as to assignment, &c.

As to a condition against under-letting, see *Barrow v. Isaacs*, 1891, 1 Q. B. 417; as to a condition for forfeiture on bankruptcy, see *Ex parte Gould, Re Walker*, 13 Q. B. D. 454. As to the meaning of "bankruptcy," see s. 2 (xv.).

That a covenant or condition against assigning, &c., does not ordinarily relate to dealings by sub-lessees, see *Williamson v. Williamson*, 9 Ch. 729; *Haywood v. Silber*, 30 Ch. D. 404.

(ii.) In case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

As to the meaning of "mining lease," see s. 2 (xi.).

(7.) The enactments described in Part I. of the second Schedule to this Act are hereby repealed.

The repeal by this subs. of s. 8 of 22 & 23 Vict. c. 35, does away with the special relief given in respect of insurance to a purchaser of a leasehold, and places him in the same position as his vendor in respect to relief generally against forfeiture. The Court would scarcely enforce a forfeiture against a purchaser without notice, or award damages or enforce a penalty against him, and he thus appears practically in as good a position in respect to insurance as under the repealed s. The case of *Ex parte Gorely*, 4 De G. J. & S. 477, rendered s. 7 of the same Act no longer necessary.

Protection of purchaser of leaseholds against forfeiture for non-insurance.

On a contract for sale of the fee simple of a house the benefit of an insurance against fire does not pass to the purchaser unless under express terms in the contract (*Rayner v. Preston*, 14 Ch. D. 297, 18 *W.* 7), and the risk of fire is the purchaser's risk from the date of the contract; but in the case of a leasehold house where the lease contains a covenant to insure, the vendor is bound to perform all

Right of purchaser to benefit of policy.

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covenants up to the time for completion, and if the house is burnt in the meantime the money must be applied in rebuilding. On completion, the purchaser must either take over the old policy or effect a new policy; but the landlord would be entitled to have the money under the old policy applied in rebuilding, in which case the benefit of it passes to the purchaser.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

Forfeiture, &c.,
for non-pay-
ment of rent.

As to forfeiture and relief against forfeiture for non-payment of rent, see Woodfall L. & T. 331, 13th ed.

Question of
good title not
altered,

This s. does not affect the principle of *Darlington v. Hamilton*, Kay 550, that a good title is not shown to property held by under-lease but subject, together with other property, to covenants, with right of re-entry, &c., in the head lease (see *Cresswell v. Davidson*, W. N., 1887, p. 86; 56 L. T. 811); nor the rule in *Hodgkinson v. Crowe*, 10 Ch. 622, that a proviso for re-entry, except for non-payment of rent, is not an "usual or customary" clause: *In re Anderton & Milner*, 45 Ch. D. 476.

nor extent of
"usual"
proviso for
re-entry.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

MORTGAGES.

IV.—MORTGAGES.

The following is a summary of the powers conferred on mortgagors and mortgagees by this Act and made incident to their estates, unless a contrary intention is expressed, except as to the first two powers, (i.) and (ii.), which apply notwithstanding any stipulation to the contrary:—

Powers of
mortgagor
conferred by
this Act.

A mortgagor

- (i.) May require the mortgagee, not being or not having been in possession, to transfer instead of reconveying, and to assign the debt: C. A., s. 15;
 - (ii.) May inspect and take copies of title deeds: s. 16;
 - (iii.) May redeem one mortgage without redeeming any other: s. 17;
 - (iv.) May have an order for sale in an action for redemption or sale: s. 25;
 - (v.) May when in possession make or agree to make agricultural or occupation leases not exceeding twenty-one years, and building leases not exceeding ninety-nine years: s. 18 (1), (17).
- (i.) and (iv.) are retrospective, (ii.) is not; (iii.) applies where the

Mortgagor in
possession.

mortgages, or one of them, are or is made after 1881; (v.) is not retrospective, except by agreement.

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A mortgagee under a *deed* made after 1881

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(vi.) May when the mortgage money has become due sell or concur in selling: ss. 19 (i.), 20, 21;

Powers of mortgagee.

(vii.) May insure: ss. 19 (ii.), 23;

(viii.) May appoint and remove a receiver: ss. 19 (iii.), 24;

(ix.) May give receipts for purchase and other moneys and securities: s. 22;

(x.) May after his power of sale has become exercisable recover the title deeds, except against persons having prior claims: s. 21 (7);

(xi.) May when in possession exercise the like powers of leasing or agreeing to lease as a mortgagor in possession: see (v.) *supra*; s. 18 (2), (17);

Mortgagee in possession.

(xii.) May when in possession cut and sell timber: s. 19 (iv.);

A mortgagee, whether the mortgage is before or after 1881,

(xiii.) May obtain an order for sale in an action for foreclosure or redemption: s. 25 (2).

Of the above (xiii.) is retrospective, (vi.) to (x.), and (xii.) are not; (xi.) is not retrospective except by agreement.

A second or subsequent mortgagee, as being a person entitled to redeem (see s. 2 (vi.)).

(xiv.) May also exercise powers (i.) to (iv.).

(xv.) On the death of a sole mortgagee dying after 1881 the estate (except copyhold or customary land to which he has been admitted) devolves on his personal representatives, notwithstanding any devise in his will: s. 30.

Devolution of mortgage estates on death.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Obligation on mortgagee to transfer instead of re-conveying.

This s. includes an equitable as well as a legal mortgage. Though a second mortgage, or any other equitable charge, is discharged by mere payment by the owner of the equity of redemption, and no re-conveyance is necessary, yet it is not so discharged if paid by another person, and if so paid, a transfer can be required under this s. of an equitable charge as well as of a legal mortgage. *and*.

When transfer of an equitable charge necessary.

A tenant for life who has obtained an order to redeem on terms which prevent interest and further costs running up against the remainderman, will be held to those terms, and cannot under this s.

Redemption by tenant for life.

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Transfer pending foreclosure action.

require transfer to a third person: *Alderson v. Elgey*, 26 Ch. D. 567; and the words "the terms" in the subs. mean "the terms" generally, not merely as to the amount of money payments: see S. C. at p. 573.

And it has been doubted whether, in a foreclosure action, a transfer, under this s., to a party outside the suit should be allowed (*Smithett v. Heskeith*, 44 Ch. D. 161); but the s. expressly gives the right to have a transfer made to *any third* person, the object being that if the subsequent incumbrancer could not provide money to take a transfer and stop foreclosure he might procure some one else to do so, otherwise the s. is practically useless.

For the rights, under this s., of successive incumbrancers and the mortgagor, as between themselves, see C. A., 1882, s. 12, and *Teevan v. Smith*, 20 Ch. D. 724.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

Why mortgagee in possession excepted.

The reason for excepting a mortgagee "being or having been in possession" (see Coote, *Mortg.* 720, 5th ed., *Re Prytherch*, 42 Ch. D. 599; *Hall v. Heward*, 32 *ib.* 435) is, that once having taken possession he remains liable for all that he might but for his wilful default have received, and also liable in respect of working minerals and other matters, and remains liable after transfer for the acts and defaults of the transferee. Having once gone into possession he remains liable though he afterwards gives up possession: see *Re Prytherch*, *ubi sup.* (except in the case of a second or subsequent mortgagee, who might go into possession and be ousted by a prior mortgagee). Consequently, though the request of the mortgagor to transfer might operate as a release by him, the liability to mesne incumbrancers would still continue. Therefore it is necessary to exclude a mortgagee "having been in possession."

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Mortgagor includes second mortgagee.

In applying this and the two following ss. it must be remembered that mortgagor includes any person deriving title under the original mortgagor or entitled to redeem: s. 2 (vi.); *Teevan v. Smith*, 20 Ch. D. 724, 730.

Decisions cancelled.

The decisions cancelled by this s. are *Dunstan v. Patterson*, 2 Ph. 345; *Colyer v. Colyer*, 3 De G. J. & S. 676, 693; and others referred to in *Fisher*, *Mortg.* 962 (c), 4th ed.; and Coote, *Mortg.* 802 (g), 5th ed.

Specific right to transfer.

This s. appears to give a specific right to have a transfer to a nominee, and therefore no other person besides the mortgagee who is required to transfer need be a defendant. The nominee takes the risk

of settling the account of what is due. If other mortgagees prior to the plaintiff are required to be defendants an offer must be made to redeem them also, and then the principal object of the enactment, namely, to buy out a mortgagee who insists on foreclosure or sale, is not attained.

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The effect of this s. taken with s. 12 of the C. A., 1882, seems to be to put an end to the old rule that a puisne incumbrancer, though entitled to redeem those above him, cannot do so without foreclosing those below him: see *Ramsbottom v. Wallis*, 5 L. J. N. S. Ch. 92; *Rhodes v. Buckland*, 16 Beav. 212; *Teevan v. Smith*, 20 Ch. D. 724, 729; Fisher on Mortgages, 4th ed., 715; and to deprive a first mortgagee of his right to retain his security unless the estate is to be entirely cleared of its incumbrances from first to last.

Effect on parties to redemption suit.

The mode of enforcing the right given by this s. will be (1) by an action to redeem, in which the mortgagee will be directed to transfer instead of re-conveying, and on refusal there will be the same remedy as on refusal to re-convey: see *Everitt v. Automatic Weighing Machine Co.*, 1892, 3 Ch. 506; (2) in case of a sale, by payment of the amount of the incumbrance into Court under s. 5, when on refusal to transfer a vesting order can be made under that s. This s. is retrospective.

How rights under this s. enforced.

Though a first mortgagee may transfer he must not join in conveying, so as to defeat a second mortgage of which he has notice, otherwise he will be liable to the second mortgagee to the extent of the balance of the purchase-money: *West London Commercial B. v. Reliance Build. Soc.*, 27 Ch. D. 187, 29 ib. 954.

Retrospective.
First mortgagee must not prejudice second mortgagee.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Power for mortgagor to inspect title deeds.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See first n. to s. 15 (3).

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom

Restriction on consolidation of mortgages.

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he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Cases affected.

As to the decisions affected by this s., see Coote, *Mortg.* ch. 68, 5th ed.; *Minter v. Carr*, 1894, 2 Ch. 321 (on Appeal, 1894, 3 Ch. 498); *Pledge v. Carr*, 1894, 2 Ch. 328 (on Appeal, 1895, 1 Ch. 51).

Equity of redemption altered.

The words "seeking to redeem" are general, and apply to the case of a mortgagor or subsequent incumbrancer giving notice to pay off as well as to the case of a redemption suit, or of a payment under an order in a foreclosure suit. Thus in the absence of agreement to the contrary, an equity of redemption arises in the mortgagor free from the right to consolidate. He is put in the same position as if he were another mortgagor, consequently the surplus proceeds of a sale (s. 21 (3)) under one security cannot be applied to make good the deficiency of another security.

How consolidation may still arise.

Under this s. consolidation of mortgages can only arise by express contract. It does not in terms repeal any previously existing rule of law, but it confers on the mortgagor a right in opposition to a previously existing rule, and at the same time permits him to waive that right by contract. The result, it is conceived, is to substitute consolidation by contract of the parties in place of consolidation by rules of equity, so that where a contract is not effectual the right to consolidate does not arise. The contract in effect gives, in certain cases, a further charge on other property, and is effectual only where the further charge would be effectual. Thus if A. purchase the equity of redemption of two estates, each from a different vendor, each estate being mortgaged to the same mortgagee, neither vendor was ever in a position to give a further charge on the other estate to his mortgagee, and there can be no consolidation of the two mortgages.

In what cases there will be no consolidation.

The costs of an action to foreclose two estates separately mortgaged to the same mortgagee by the same mortgagor to secure separate sums, must be apportioned rateably between the two properties: *De Caux v. Skipper*, 31 Ch. D. 635, overruling *Clapham v. Andrews*, 27 Ch. D. 679.

Costs of foreclosure of two separate mortgages.

Effect of subs. 3.

The effect of subs. 3 is to reserve to a mortgage made before the commencement of the Act its old right in equity to become consolidated with another mortgage, also made before the commencement of the Act.

In ordinary cases the mortgagee will be content to rely on the one security taken by him as being sufficient, and will not reserve the right to consolidate. In special cases, as loans to builders, where it is

intended to make numerous advances, the right to consolidate will be reserved. Where the contract is for a single loan on specific property, there can be no more obligation on the solicitor of the lender to obtain a further charge on other property contingent merely on its becoming vested in his client as mortgagee, than to take a charge on all other present and future property of the mortgagor.

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Leases.

Leases.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Leasing powers of mortgagor and of mortgagee in possession.

It would seem that the lease may operate to confer rights of light, &c., over adjoining land, at least so far as the law gives a right of light to a lessee: *Wilson v. Queen's Club*, 1891, 3 Ch. 522.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

The prior incumbrancers mentioned in this subs. are those becoming such after the commencement of the Act, but by agreement incumbrancers who became such previously may be included (see subs. 16).

(3.) The leases which this section authorizes are—

- (i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and
- (ii.) A building lease for any term not exceeding ninety-nine years.

See definition of building lease, s. 2 (x.).

A mining lease is not authorized by this s., as it involves an abstraction of part of the security, but it can be brought within this s. by agreement: see subs. 14.

As to mining lease.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

A grant of a new lease to the lessee in possession under an existing

What is a lease in possession.

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lease operates as a surrender in law of the existing lease, and is therefore (if no underlease be subsisting) a lease in possession: Sugd. on Pow. p. 777, 8th ed.; Farwell on Pow. 2nd ed. p. 616; and see *Wallis v. Hands*, 1893, 2 Ch. 75. Whether this will be so if an underlease is subsisting seems doubtful: see 21 Geo. 2, c. 28, s. 6; *Ecclesiastical Commissioners v. Tremer*, 1893, 1 Ch. 166; Farwell on Pow. 2nd ed. p. 617. Having regard to the latter part of the s. last mentioned, the condition of re-entry required by sub-s. 7 of this s. would not be effective, where the new lease is at a higher rent. But if the existing lease was granted before the mortgage or granted after the mortgage under this s., the mortgagor has not the legal reversion, and the concurrence of the mortgagee to accept the surrender seems necessary. In this respect the surrender of a lease of mortgaged property stands on a different footing from the surrender of a lease of settled land. A tenant for life, equitable as well as legal, of settled land, has a statutory power to accept a surrender: see S. L. A., 1882, s. 13 and n. It may be said that, the mortgagor having power to grant a legal term, that term when granted necessarily operates as a surrender and merger of the term of the existing lease, but the power to grant seems to depend on the power to take a surrender. If there is no power to take a surrender, s. 25 (4) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), seems to prevent legal merger, so that the new lease would not be a lease in possession even as regards the legal estate. It seems right that a lease should not be surrendered without the concurrence of the mortgagee.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of

the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connection with building purposes.

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Compare S. L. A., 1882, s. 8, & *Re Chawner's S.E.*, 1892, 2 Ch. 192; *Re Daniell's S.E.*, 1894, 3 Ch. 503.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

The penalty for omitting to deliver the counterpart is that the power of sale becomes exercisable (see s. 20 (iii.)). The validity of the lease is not affected.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

A contrary intention (if any) will be expressed by the mortgagor and mortgagee in the mortgage deed, whether the mortgagee executes or not. The mere acceptance by him of the security binds him, as in the ordinary case of an agreement not to call in the principal money for a fixed term, or for reduction of interest.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or

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the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

Special provisions allowed.

This subs. enables special provisions to be made as to leasing, and leases made in accordance with such provisions will be in the same position as leases authorized by this s.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

This subs. enables the provisions of this s. to be applied in case of mortgages made before 1881.

Mortgage after the Act under agreement.

Under an agreement made before this Act to execute a mortgage containing a power of sale and all usual clauses, the mortgagee is not entitled to have the operation of this s. excluded: *Nugent & Riley's Contract*, W. N., 1883, 147; 49 L. T. 132.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Subs. 17, extending the provisions of this s. to agreements, whether in writing or not, for leasing or letting, must be read in connection with the Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, and with 8 & 9 Vict. c. 106, s. 3, by the combined operation of which enactments a

lease for three years or less may be in writing or parol, but a lease for more than three years must be by deed : see Woodfall, L. & T. 127, 13th ed.

The effect of the words "so far as circumstances admit," is that subs. 7 and 8 as to covenant, condition of re-entry, and counterpart do not apply to a parol agreement, and subs. 7 as to covenant does not apply to an agreement in writing, except that there ought to be the nearest approach to a covenant, namely an agreement to pay rent.

This s. removes serious difficulties in granting leases of mortgaged property : see Woodfall, L. & T. 50, *et seq.*, 13th ed.

Power is given to the person in possession, whether owner or incumbrancer, to grant, or contract to grant (subs. 12), leases of the kind specified in subs. 3, conformable to the other provisions of this s. These leases will be binding on all other persons interested, and will confer a valid legal term, leaving a legal reversion in the mortgagee, assuming the mortgage passed the legal estate to him. The rent and the benefit of the lessee's covenants (see s. 10) will become annexed to the actual legal reversion, and thus the owner and incumbrancers will be in the same position as if they had all joined in granting the lease (see *Greenaway v. Hart*, 14 C. B. 340). The actual legal reversioner will have the same remedies as to recovery of rent, suing on covenants, and re-entry for condition broken, and be in the same position as if he had granted the term, and will be entitled to the counterpart under subs. 8 or 11 as the case may be. The lessee will also, to the extent of covenants or provisions in his favour authorized by law (see *Wilson v. Queen's Club*, 1891, 3 Ch. 522), or (see subs. 14) by the mortgage deed, have the same rights against the actual reversioner and persons claiming under him as if he had made or joined in making the lease (see s. 11).

If the mortgagor's power to lease given by this s. is excluded, then under a lease made by the mortgagor after the mortgage the mortgagee has no reversion, the covenants by the lessee are covenants in gross, and cannot be sued upon by the mortgagee if he forecloses or takes possession, nor by a purchaser from him if he sells, unless the mortgagor joins in conveying : see *Cuthbertson v. Irving*, 6 H. & N. 135 ; *Morton v. Woods*, L. R. 3 Q. B. 658, 4 *ib.* 293. The only remedy of the mortgagee when he takes possession is to eject the lessee. This in most cases is not desired, and is an inadequate remedy, especially in the case of house property, where an essential part of the value of the reversion consists in an available remedy against the tenant on the covenants to paint, repair, deliver up in repair, &c. In the case of agricultural land also, the covenants may be of importance if only to give the right to an injunction. Also if the operation of the Act be excluded, acceptance of rent by the mortgagee, or by a purchaser from him, will constitute the lessee simply tenant from year to year at Common Law, without reference to the terms of the lease, unless a special agreement be previously made (Woodfall, L. & T. 53, 13th ed. ; *Corbett v. Plowden*, 25 Ch. D. 678), and in the case of agricultural land, will bring into operation the Agricultural Holdings Act, 1883,

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Parol agree-
ment.

Effect of leases
under this s.

Right of
reversioner.

Effect of
excluding
operation of
s. 18.

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which renders necessary a year's notice expiring with a year of tenancy; and in the case of such land as to a mortgagee's rights against a person occupying under a contract of tenancy not binding on the mortgagee, see *Tenants Compensation Act, 1890, 53 & 54 Vict. c. 57, s. 2*. On the other hand, if the lease be made under this s. the mortgagee on taking possession has his remedy for rent on the covenants (*Municipal, &c., Building Soc. v. Smith, 22 Q. B. D. 70*), and is not affected by any collateral agreement between the mortgagor and the lessee.

If any restriction is to be placed on the power of the mortgagor to lease under this s., it should at most extend to prevent him from granting leases either without certain desired restrictions or without the consent in writing of the mortgagee. The mortgagor must generally, to make his property available, grant leases of some kind, and it is not advisable to compel him to lease as equitable owner only.

Agricultural Holdings Act.

A sum due for compensation under the *Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61)*, in respect of a lease granted by a mortgagor under this s. would not, it is conceived, be recoverable personally against the mortgagee, but would be only a charge on the holding as against him (s. 31), he being a landlord entitled to receive rents and profits in a "character otherwise than for his own benefit."

Sale; Insurance; Receiver; Timber.

Sale should be expressed to be under this Act.

Sale; Insurance; Receiver; Timber.

A conveyance by a mortgagee selling under the following power should, as is customary in the case of powers given by deed, expressly refer to the power. This, however, is only necessary for the purpose of obtaining the benefit of s. 21 (2), which (following *Lord Cranworth's Act, s. 13*) only exempts a purchaser from the consequences of an irregularity when the sale is in professed exercise of the power of sale conferred by this Act.

Mortgage should be by deed.

Several mortgages for separate sums.

This s. only applies to mortgages by deed: subs. 1.

Where several mortgagees claim under one mortgage, though in distinct sums, it is conceived that all must join in the exercise of the powers conferred on a mortgagee by this Act: see s. 2 (vi.), where "mortgage money" means money, i.e. the whole money secured by the mortgage, and "mortgagee" (which includes the plural) must necessarily have a corresponding meaning; and see *Blaker v. Herts & Essex Waterworks Co., 41 Ch. D. 399*; but in mortgages of that kind, and in all other special cases, express provision should be made as to who is to exercise the powers (see, for this purpose, subs. 2 and 3 of s. 19).

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

- (i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

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As to the exercise of the power of sale conferred by this a., the conveyance and the application of the sale money, see ss. 20, 21, and as to the power of a mortgagee to give receipts for the sale or other money or securities comprised in the mortgage, see s. 22.

As to the duty of mortgagees where the mortgaged estate is sold with other property, see the analogous case of the sale of trust property, note to T. A., s. 13.

The statutory form in the Bills of Sale Act, 1882, does not incorporate the power of sale given by this Act: *Calvert v. Thomas*, 19 Q. B. D. 204; nor does the power of sale apply in the case of several debentures given by a joint stock company, see *Blaker v. Herts, &c.*, *Waterworks Co.*, 41 Ch. D. 399; and as to a mortgage to a building society in the ordinary form, see *Re Thompson & Holt*, 44 Ch. D. 492.

Mortgaged estate sold with other property.
 Bills of Sale Act, 1882.
 Debentures and building society mortgages.
 Trade fixtures.

The words in subs. 1 "or any part thereof" do not authorize a sale of trade machinery separately from the land: *Re Yates, Batcheldor v. Yates*, 38 Ch. D. 112. It would seem to follow that mines could not be sold separately from surface (*Buckley v. Howell*, 29 Beav. 546; but see T. A., s. 44, *infra*, and note thereon), nor an easement granted (*Dayrell v. Hoare*, 12 A. & E. 356).

- (ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

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When mortgagee may insure

Under this subs. the mortgagee will be justified in insuring, unless the mortgagor shews by delivering receipt for premium, or otherwise, that a proper insurance is maintained.

As to the amount and application of the insurance money and the cases in which the mortgagee is not by this Act authorized to insure, see s. 23.

As to the law before the Act, see *Dobson v. Land*, 8 Ha. 216, and 23 & 24 Vict. c. 145, s. 11 (2).

- (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

As to the appointment, powers, &c., of a receiver, see s. 24.

- (iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

On this subs., see *Batchelder v. Yates*, 38 Ch. D. 112, at pp. 117, 129.

Proceeds of timber.

It is conceived that proceeds of the sale of timber will be rents and profits, and need not be treated as at once applied (like proceeds of sale of the inheritance, see *Thompson v. Hudson*, 10 Eq. 497) in discharge of interest and costs, and then of principal, on taking the account against the mortgagee. As to the mode of taking such account, see *Union Bank of London v. Ingram*, 16 Ch. D. 53.

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act. SS. 19, 20.

This s. replaces Part II. of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which is repealed (see second schedule to this Act, Part III.), and gives the more complete and extensive powers now usually inserted in mortgage deeds. Lord Cranworth's Act only applied to hereditaments. This s. applies to "property" generally, which word includes all real and personal estate, choses in action, and every right or interest which is capable of being mortgaged: see s. 2 (1).

The mortgage deed may extend or restrict the powers given by this Act, and the extended or restricted powers have effect under subs. 2, as if conferred by this Act.

20.—A mortgagee shall not exercise the power of sale conferred by this Act unless and until— MORTGAGEE.
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Powers more extensive than in Lord Cranworth's Act.

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

As to giving notice, see s. 67.

Where a first mortgage contained a power of sale with a proviso that the power should not be exercised without giving notice to the mortgagor or his assigns, the mortgagee having received notice of a second mortgage was held liable in damages to the second mortgagee for not giving him notice before selling (*Hoole v. Smith*, 17 Ch. D. 434), and notice to the mortgagor alone was held insufficient, but it was not decided whether notice to the second mortgagee alone would have been sufficient. It is conceived that the mortgagor is not entitled to burden his mortgagee with more than one notice, at least where it is to be given to the mortgagor or his assigns. As "mortgagor" includes "any person entitled to redeem according to his estate, interest, or right in the mortgaged property," the expression "one of several mortgagors" means, it is conceived, "one of the several persons entitled, &c., according to his estate," &c., and that it is sufficient if notice of sale be given to the first subsequent incumbrancer who has given notice of his security to the mortgagee who sells.

Where an immediate power of sale is desired without notice and without the other restrictions in this s., the proper course will be to agree that the mortgagee shall have the power of sale conferred by this Act, but without the restrictions on the exercise thereof imposed by this s.

"Month" means calendar month: see note at end of s. 2 above. Regulation of exercise of power of sale.
Notice.
How and to whom to be given.
Mode of excluding this s.
Month means calendar month.

Where the months are broken the computation of a calendar month commences from a given day in one month to the day with the

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corresponding number in the ensuing month: *Freeman v. Read*, 11 W. R. 802. The first day is excluded: *Young v. Higgon*, 6 M. & W. 49; *Re Railway Sleepers Supply Co.*, 29 Ch. D. 204.

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

Interest where no covenant.

Where there is no covenant for payment of interest, after the principal becomes due, there would still, it would seem, be interest accruing, at the old rate, "under the mortgage" as "redemption money": see *Cook v. Fowler*, L. R. 7 H. L. 27; *Re Roberts*, 14 Ch. D. 49 (per Cotton, L.J. at p. 52); *Gordillo v. Weguelin*, 5 Ch. D. 287, at pp. 297, 301-2; *Re Frisby*, 43 Ch. D. 106 (see remarks of Fry, L.J., at p. 114). Such interest accrues due from day to day, and "some interest" would, it is conceived, be "in arrear and unpaid" under this subs. at any time when no interest had been paid for more than two months.

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Under this subs. the power of sale arises on breach of a provision which the mortgagor ought to observe, as, for instance, in a mortgage of a life interest and policy of assurance, on a breach of the covenant as to keeping the policy on foot, or such a statutory provision as in s. 18 (11) above.

Conveyance, receipt, &c., on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom in that behalf.

Mode of exercising power of sale.

Under this s. the mortgagee will proceed exactly as under the ordinary power of sale in a deed. He will convey the freeholds and

also any customary freeholds passing by deed and admittance, and also his equity in copyholds by deed. As to copyholds passing by surrender and admittance, if he has a surrender, or if the mortgage was made by a tenant for life, or a person having the powers of a tenant for life, under S. L. A., 1882, s. 20, he will be admitted and surrender to the purchaser. If he has no surrender, and the mortgage was not made under that Act, the legal estate must be obtained by vesting order or otherwise as before the Act.

A mere surrender of copyholds by way of mortgage, if not under seal, confers no power to sell, but it is conceived that a deed containing a covenant to surrender would confer the power; a covenant to convey freeholds would confer the power, and a covenant to surrender copyholds is a similar covenant to convey. In order clearly to give the power the deed might contain an express charge (which is included in the expression "mortgage," see s. 2 (vi.)), and also a declaration that the mortgagor holds the copyholds in trust for the mortgagee, so as to enable a vesting order to be obtained if required.

A similar declaration of trust of a term in leaseholds should be contained in a mortgage by demise.

Under s. 15 of Lord Cranworth's Act (23 & 24 Vict. c. 145) it has been held in *Hiatt v. Hillman*, 19 W. R. 694, that a mortgagee by sub-demise of leaseholds could assign the whole of the original term, and in *Solomon & Meagher's Contract*, 40 Ch. D. 508, that an equitable mortgagee, selling after 1881 under that Act, could convey the legal estate. This s. confers no such power (*Hodson & Howes' Contract*, 35 Ch. D. 668), but it can be conferred by means of an irrevocable power of attorney under C. A., 1882, s. 8, which remains in force notwithstanding the death of the principal, but, it is conceived, ceases on the death of the attorney.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

See *Dicker v. Angerstein*, 3 Ch. D. 600.

This subs. will not protect a purchaser buying with actual knowledge that the requisite notice was not given: *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; *Selwyn v. Garfit*, 38 Ch. D. 273; *Re Thompson & Holt*, 44 Ch. D. 492; and see *Bailey v. Barnes*, 1894, 1 Ch. 25; *Re Tritton*, W. N., 1891, p. 194.

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MORTGAGES.

Sale; Insurance; Receiver; Timber.

Mere surrender gives no power to sell copyholds.

Declaration of trust by mortgagor as to copyholds.

And as to leaseholds.

Power to convey under Lord Cranworth's Act.

Power under this Act.

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MORTGAGES.

*Sale; Insurance;
Receiver;
Timber.*

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

As to paying —
prior charges.

Under this subs. the mortgagee is authorized not merely to discharge prior incumbrances, but to pay in the sum required under s. 5 to be paid into Court to answer them. He can then sell free from incumbrances. The last words of this subs. include a subsequent incumbrancer (s. 22), to whom therefore a mortgagee may pay any surplus.

Surplus to
subsequent in-
cumbrancer.

As to payment
of surplus.

The mortgagee must, however, take care that he pays the residue to the right person: see *W. London Commercial Bk. v. Reliance Bg. Soc.*, 27 Ch. D. 187; 29 *ib.* 954. This is a liability which as trustee of the residue he cannot avoid, but in a doubtful case he can pay the money into Court, or invest it for the benefit of the persons entitled: *Charles v. Jones*, 35 Ch. D. 544, 550; otherwise, he must pay interest thereon at 4 p. c. (see that case).

And as to claims to surplus of sale money being Statute barred or not, see *Banner v. Berridge*, 18 Ch. D. 254, pp. 260-70; *Soar v. Ashwell*, 1893, 2 Q. B. 390; *Thorne v. Heard*, 1894, 1 Ch. 599.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

Mortgagee is
not a trustee
for sale.

A mortgagee, though, in selling, he has his duties towards his mortgagor, is not a trustee for sale: see *Warner v. Jacob*, 20 Ch. D.

220; *Tomlin v. Luce*, 41 Ch. D. 573, 43 *ib.* 191; *Farrar v. Farrars, Limited*, 40 Ch. D. pp. 410-11.

SS. 21, 22.

MORTGAGES.

Sale; Insurance; Receiver; Timber.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

On a sale by a second or subsequent mortgagee, being a person entitled to redeem (see definition of mortgagor, s. 2 (vi.)), he can, as against a prior mortgagee, under deed subsequent to 1881, obtain production of the title deeds so as to shew the title; and having made the proper payments under s. 5 to answer all prior incumbrancers, he is entitled under this subs. to recover the title deeds from the first mortgagee, who would then be a bare trustee of the legal estate.

Production of deeds.

Recovery of deeds.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

Mortgagee's receipts, discharges, &c.

It is conceived that this s. applies only to a mortgagee whose mortgage is after 1881. The supposed mortgagee is one who has a power of sale conferred by this Act, which a mortgagee before 1882 has not; see s. 19 (4).

The receipt of the mortgagee is a complete protection to a *bond fide* purchaser without notice, even though the security should prove to have been satisfied (*Dicker v. Angerstein*, 3 Ch. D. 600).

Mortgagee's receipt valid though security satisfied.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses

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SS. 22, 23.

MORTGAGES.

Sale; Insurance; Receiver; Timber.

Mortgagee's receipt for surplus sale money and securities.

payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

This s. enables a mortgagee to give a discharge, not only for money arising by sale, but also for money or securities assigned by the mortgagee or arising thereunder; for instance, to give a receipt for the surplus on a sale by a prior mortgagee, or in case of a mortgage of a policy or of a reversionary interest in stock, to give a receipt for the policy money or for the stock, and to apply the money in discharge of the debt and costs, and in case of stock, to sell the stock for that purpose.

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is, by this Act, authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the

contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

SS. 23, 24.

MORTGAGES.

Sale; Insurance; Receiver; Timber.

Under 14 Geo. 3, c. 78, s. 83, insurance money on houses and buildings must at the request of any person interested, or may, in cases of suspicion, be applied in reinstating them: see *Ex parte Gorely*, 4 D. J. & S. 477; *Rayner v. Preston*, 18 Ch. D. 1 (pp. 7, 15); *Castellain v. Preston*, 11 Q. B. D. 380.

When insurance money to be expended on reinstating.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

Appointment, powers, remuneration, and duties of receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

Compare the dicta in *Jefferys v. Dickson*, 1 Ch. 183, p. 190; *Law v. Glenn*, 2 Ch. 634, p. 641; as to a receiver's personal liability to creditors and others, see and compare *Owen v. Cronk*, 1895, 1 Q. B. 265; *Burt v. Bull*, *ib.* 276.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

Under this subs. the receiver acts subject to the rights of any prior mortgagee and to the powers of his receiver (see n. to subs. 8).

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

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MORTGAGES.

Sale; Insurance; Receiver; Timber.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

- (i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and
- (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage in right whereof he is receiver; and
- (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
- (iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

The power to appoint a receiver is by s. 19 given to the mortgagee to the like extent as if in terms conferred by the mortgage deed. The receiver of a second or subsequent mortgagee will therefore (see subs. 3 of this s.) be liable to be superseded by the receiver of a prior mortgagee when appointed, but the receiver for the time being, whether under a first or any subsequent mortgage, will, it is conceived, have under subs. 3 and 4 power to recover and give a legal discharge for rent. To prove that the person appointing the receiver is actually a mortgagee, the mortgage deed must be produced. Where it is desired to avoid this, a counterpart of the mortgage may be taken. As mortgage deeds will in future be short, the cost of a counterpart will be much less than that of the old receivership deed.

Any necessary or proper repairs which a mortgagee could not himself make, unless expressly authorized, without incurring the liability of a mortgagee in possession, may be made by the receiver, if directed in writing by the mortgagee under subs. 8 (iii.).

When a receiver under this Act has been appointed the Court will restrain the mortgagor from distraining for rent, even, it seems, though the receiver be negligent: *Bayly v. Went*, W. N., 1884, 197. When an action is pending the receiver should be appointed by the Court, and not under this Act: *Tillett v. Nixon*, 25 Ch. D. 238; and see *Re Henry Pound, Son, & Hutchins*, 42 Ch. D. 402, 415.

Where there is no covenant for payment of interest after the principal is due, as to what is "the interest accruing due," see n. to s. 20 (ii.), *supra*.

It is conceived that the interest which, under subs. 8 (iv.), the receiver is to pay, is not only that accruing after his appointment, but any arrears; the fact of interest being in arrear is of itself a reason for his appointment; see subs. 1 and s. 20 (ii.).

SS. 24, 25.

MORTGAGES.

Sale; Insurance; Receiver; Timber.

Position of a receiver.

Power to appoint, how proved.

Repairs by receiver.

Distress after receiver appointed.

Appointment by Court.

"Interest accruing due."

Action respecting Mortgage.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money, or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any

Action respecting Mortgage.

Sale of mortgaged property in action for foreclosure, &c.

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MORTGAGES.

Action respecting Mortgage.

person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.

(7.) This section does not extend to Ireland.

As to this s., see observations on s. 5.

15 & 16 Vict.
c. 86, s. 48.

The result of decisions (see *Morgan's Chancery Acts*, 196, 197, 5th ed.) was to give a very limited operation to s. 48 of 15 & 16 Vict. c. 86 now repealed (see second schedule, Part II.), and replaced by this s.

Orders for sale
under this's.

An order for sale may be made under this s. in a foreclosure or redemption action at any time before the action is concluded by a foreclosure absolute: *Union B. of L. v. Ingram*, 20 Ch. D. 463 (mortgagee's request: security insufficient); on an interlocutory application before trial of the action: *Woolley v. Colman*, 21 ib. 169 (mortgagor's request); or even on the motion for foreclosure absolute where a summons for further time has been previously taken out: *Weston v. Davidson*, W. N., 1882, 28 (mortgagor's request); and it can be made at request of, and giving conduct to, the mortgagor, though the mortgagee's statutory power of sale has arisen: *Brewer v. Square*, 1892, 2 Ch. 111.

An order for sale still usually directs the sale to be made, as before this Act (see *Seton, Decrees*, 1396, 802, 4th ed.), subject to the

incumbrances of such of the incumbrancers (not being parties) as do not consent. But the sum to meet their charges can be paid into Court under s. 5. Any whose charges cannot be so provided for must be made parties.

The owner of, or any incumbrancer on, an incumbered estate can under this s. bring an action for sale and application of the proceeds (see note to s. 5), but before commencing an action for redemption or sale he should be certain that he can provide the requisite deposit or security for costs, otherwise he may find himself foreclosed.

If the mortgagee asks for a sale under this s., the course of proceeding will be much the same as before the Act in a similar case. If the mortgagor asks for a sale instead of being foreclosed as defendant, or bound to redeem as plaintiff, the course of proceeding is new. In *Woolley v. Colman*, 21 Ch. D. 169, the owner of the equity of redemption was plaintiff, the property being subject to several mortgages. A sale was directed at a reserve price sufficient to pay the two first mortgagees, who opposed a sale, and with the assent of the subsequent mortgagees the conduct of the sale was given to the mortgagor, who was ordered to give security for the costs of it. Where the mortgagor was defendant, and had the conduct of the sale, he was not ordered to give security for costs: *Davies v. Wright*, 32 Ch. D. 220; but see *Brewer v. Square*, *ubi sup.* In both these cases the sale was allowed to be made out of Court, but the proceeds were directed to be paid into Court. In *Wade v. Wilson*, 22 Ch. D. 235, a foreclosure action, in which one of the defendants, the mortgagor, did not appear, and the other, the second mortgagee, made default in pleading, the usual account was directed, and then, after one month from the certificate (see *Green v. Biggs*, *ubi infra*), a sale of a sufficient part of the property to pay the amount found due to the plaintiff. In *Oldham v. Stringer*, W. N., 1884, 235; 33 W. R. 251, there was a deposit of deeds without any memorandum, and a sale was ordered instead of foreclosure (mortgagee's request; security insufficient). A sale was ordered also in *Green v. Biggs*, W. N., 1885, 128, and in *Jones v. Harris*, W. N., 1887, 10 (in each case at mortgagee's request; three months allowed from certificate), but was refused in *Merchant Banking Co. v. London and Hanseatic Bank*, W. N., 1886, 5; 55 L. J. Ch. 479 (mortgagor's request; but sale, at a reserve price to cover the mortgage debt, was likely to be abortive); *Hopkinson v. Miers*, 34 Sol. J. 128 (mortgagee's request; but no evidence of security being insufficient; and the property was part of a family estate); and *Smithett v. Hesketh*, 44 Ch. D. 161 at p. 163 (mortgagor's request; no evidence of value of the property); also in *Provident Clerks' Mutual Life Assurance Association v. Lewis*, 67 L. T. N. S. 614.

See also *Brewer v. Square*, *ubi sup.*, and the order in *Seton*, 5th ed., 1590 (Form 18); *Norman v. Beaumont*, W. N., 1893, 45; and notes in *Seton*, 5th ed., 1591-3.

S. 25.

MORTGAGES.

Action respecting Mortgage.

Course where sale asked by mortgagee or mortgagor.

SS. 26, 27.

STATUTORY
MORTGAGE.

Form of
statutory
mortgage in
schedule.

V.—STATUTORY MORTGAGE.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thierafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money.

This clause imposes no statutory personal liability on an assignee of the equity of redemption: see *Re Errington*, 1894, 1 Q. B. 11.

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor or as he shall direct.

Forms of
statutory
transfer of
mortgage in
schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third

Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

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MORTGAGE.

The statutory transfer is available only where the mortgage is also statutory.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of, and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

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STATUTORY MORTGAGE.

"On the next of the days": this is equivalent to a covenant not to sue until then: *Bolton v. Buckenham*, 1891, 1 Q. B. 278. As to its effect on the personal liability of a surety, see that case; and for its effect on the security given by a surety, see *Bolton v. Salmon*, 1891, 2 Ch. 48.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of its being designated a mortgage.

A transfer of a mortgage, although further security is given, is only chargeable with duty as a transfer: 33 & 34 Vict. c. 97, s. 109; *Wale v. Commissioners of In. Rev.*, 4 Ex. D. 270; Stamp Act, 1891, s. 87 (3).

Implied
covenants,
joint and
several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect to the share or distinct sum secured to him.

See s. 61, *infra*.

Form of re-
conveyance of
statutory
mortgage in
schedule.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

The statutory re-conveyance is available only where the mortgage is statutory also.

The object of ss. 26-29 is to enable mortgages, transfers of mortgage, and re-conveyances to be made in very short forms. The forms are given in the third schedule. They do not readily admit of alteration, and will probably be used only in quite simple cases, where proper legal advice is dispensed with.

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STATUTORY
MORTGAGE.

VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

TRUST AND
MORTGAGE
ESTATES ON
DEATH.

Devolution of
trust and
mortgage
estates on
death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

37 & 38 Vict.
c. 78.
38 & 39 Vict.
c. 87.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

Copyhold or customary lands are "tenements or hereditaments" included in this s.: *Re Hughes*, W. N., 1884, 53; *Hall v. Bromley*, 35 Ch. D. 642. But s. 45 of the Copyhold Act, 1887, enacted as follows:—

Copyholds.

45. The thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold

Copyhold Act,
1887, s. 45.

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ESTATES ON
DEATH.

or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage.

The Copyhold Act, 1887, is now repealed by the Copyhold Act, 1894, s. 88 of which enacts as follows:—

Copyhold Act,
1894, s. 88.

88. Section thirty of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage.

Unadmitted
mortgagees.

Where the mortgagee (as mostly happens) is not admitted and dies the land is not at his death vested in him as tenant on the Court Rolls, and the right to admittance seems still to vest in his personal representatives under s. 30. An unadmitted heir or devisee of a mortgagee seems to be in the same position.

Extent of the
repeal.

No time is specified for the commencement of the operation of s. 45 of the Copyhold Act, 1887. The result is that s. 30 must now be read as having never applied to copyhold or customary land to which a trustee or mortgagee has been admitted. Such land as from the 31st December, 1881, up to the 16th September, 1887 (when the Copyhold Act, 1887, was passed), is divested out of the personal representative and revested in the customary heir or the devisee of trust and mortgage estates unless in the meantime a conveyance has been made by the personal representative (*Re Mills' Trusts*, 37 Ch. D. 312; 40 *ib.* 14). If this holds good where the personal representative has been admitted then a second fine will now be necessary on admittance of the heir.

Vesting order.

Where the mortgagee has been admitted, and leaves an infant heir, an order may be made vesting the land in the executors: *Re Franklyn's Mortgage*, W. N., 1888, 217.

The repeal effected by s. 45 of the Copyhold Act, 1887, is only directed to s. 30 of this Act, consequently as regards deaths before 1st January, 1882, when the C. A. took effect, s. 4 of the V. & P. A. still remains in force. The confusion introduced by s. 45 seems considerable. The object was to avoid the larger fine payable on admittance of a stranger in some manors, and might have been attained by giving the personal representative power to convey.

As regards those hereditaments to which alone s. 30 now applies, namely, hereditaments which are not of copyhold or customary tenure, or hereditaments of either of those tenures to which there has been no admittance, that s. operates to constitute the executor or administrator devisee of trust and mortgage estates (*Re Hughes*, W. N., 1884, 53). Whether as to any particular land he is such devisee will be shewn in the same manner as if there were an actual devise.

Personal
inheritance.

The word "hereditaments" includes, more clearly than the word "land," a personal inheritance, as an annuity to one "and his heirs": see Co. Lit. 2 a, 20 a; *Stafford v. Buckley*, 2 Ves. Sen. 170; *Holder- nesse v. Carmarthen*, 1 Bro. C. C. 377. Such annuities are sometimes

granted by corporations (Manchester, for instance) charged on the borough fund.

No question as to assent by an executor arises under this s. He is put in the position of devisee, and cannot properly convey a trust estate except to a duly appointed trustee; nor does an executor generally assent to a bequest of leaseholds held in trust; he only assigns them to a duly appointed trustee: nor to a bequest of leaseholds in mortgage, as he retains the legal estate in order to get in and receive the money.

The constitution of the personal representative to be trustee operates like a devise to exclude the heir from being trustee.

In the case of *Re Pilling's Trusts*, 26 Ch. D. 432, Pearson, J., asked, "What happens when there is no personal representative? If the legal estate does not vest in the heir, where is it?" The same might be asked as to a term of years. In the Colony of Victoria it has been decided that until administration the land descends to the heir-at-law, who can maintain ejectment, but upon grant of administration it vests in the personal representative as from the death: *Larkin v. Drysdale*, 1 Vict. L. Rep. (Law) 164; Wood's Laws of the Australasian Colonies, p. 110. Clearly the heir cannot convey the fee, as he, if taking, takes only until a representative is constituted, and in the absence of a personal representative a vesting order is necessary: *Rackstraw's Trusts*, 33 W. R. 559; W. N., 1885, 73; *Williams' Trusts*, 36 Ch. D. 231.

Executors derive their title from the will, not from the probate, and can under this s. convey before probate a legal freehold as well as a term held in trust by their testator: see, however, *Re Parker's Trusts*, 1894, 1 Ch. 707. Probate is only proof of their title. If all the executors die before probate, subsequent letters of administration are sufficient proof of that title (Wms. Exors., 309, 8th ed.).

One of several executors or administrators can convey a chattel real, see *Williams on Executors*, 8th ed., 950, 954; *Simpson v. Gutteridge*, 1 Madd. 609, 616; *Jacomb v. Harwood*, 2 Ves. Sen. 267-8.

It will now be unnecessary, and also useless, to make any devise of trust or mortgage estates, not being of copyhold or customary tenure. Their devolution is assimilated in all respects to the devolution of a term of years, which must pass to the personal representative; and notwithstanding any devise, the personal representative is the person to convey, and is in all cases the "heir" and "assign" for the purpose of exercising all trusts and powers.

On the death of a personal representative a new representative must be constituted as in case of personalty. If the executor of a trustee or mortgagee dies and there is no executor to his estate, letters of administration must be taken out to the trustee or mortgagee. The title to a freehold trust or mortgage estate (see *Re Hughes*, W. N., 1884, 53) will in fact be made exactly as if it had been a term of years held in trust or mortgage.

Though a freehold trust or mortgage estate now passes to the personal representative it must still be conveyed to the trustees or

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No question
as to assent
arises.

Heir excluded
as trustee.

Whether the
heir takes until
administration.

Executors may
convey before
probate.

A single per-
sonal represen-
tative may
convey.

Devise of trust
estates how
far proper.

Title to free-
hold trust
estate same as
leasehold.

Trust estate
must still be
limited to
"heirs," etc.

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—
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ESTATES ON
DEATH.
—

Devolution of
powers of
trustees.

mortgagees "and their heirs" or "in fee simple" (see s. 51), in order to give them the fee simple.

The powers of trustees devolve only on those who are specified as persons to execute the trust; and s. 38 (now T. A., s. 22) carries the power to the survivor where the trust is created after 1881. Thus a devise to A. and B. on trust to sell, enables A. and B. and also the survivor of them to sell. The decision in *Osborne to Rowlett*, 13 Ch. D. 774, appears to be an authority that the same applies to trusts created before 1882, but as to the actual decision, see *Re Morton & Hallett*, 15 Ch. D. 143. Where heirs are not specified, the heir of the survivor could not, as it seems (see *Re Morton & Hallett*), before 1882 have sold, though the fee devolved on him, consequently the personal representative of the survivor could not now sell: *Re Ingleby & the Norwich Union Co.*, 13 L. R. Ch. D. Ir. 326; and see as to trustees' powers: *Newman v. Warner*, 1 Sim. N. S. 457. If the devise is "to A. and B. and their heirs on trust to sell," or to A. and B. in fee simple upon trust "that they and their heirs," or "executors or administrators," or "the trustees or trustee for the time being" (*Re Morton & Hallett*; *Re Cunningham & Frayling*, 1891, 2 Ch. 567) "shall sell," then under s. 30 the personal representative of the survivor can sell. The effect of s. 30 is that there cannot now (except as to copyhold and customary hereditaments) be any "assign" of a trust estate by means of a devise. The only "assign" is a trustee duly appointed, and s. 31 (5) (now T. A., s. 10 (3)) gives him all the powers of an original trustee, so that (except as before mentioned) it is unnecessary now to specify assigns in order to enable them to execute the trust.

Devisees are
"assigns."

Persons taking by devise or bequest are "assigns" in law: "testamentary assigns," see *Whitfield v. How*, 2 Show. 57; *Titley v. Wolstenholme*, 7 Beav. 425, 436; *Osborne to Rowlett*, *ubi sup.*, pp. 786, 795.

When vendor
trustee for
purchaser.

Where there is a valid contract binding on both vendor and purchaser, and at the vendor's death, either he has made out his title according to the contract, or the purchaser has accepted the title however bad, the vendor is a trustee for the purchaser (*Lysaght v. Edwards*, 2 Ch. D. 506, 507), and this s. applies. But see *Re Colling*, 32 Ch. D. 333, as to how the trust is to be established: and *Re Pagani*, 1892, 1 Ch. 236.

Cases affected.

This s. renders obsolete, as regards persons dying after 1881 (except as to copyhold and customary land to which there has been an admittance), all the decisions as to what words pass trust and mortgage estates, and as to whether the trusteeship passes to the devisees of trust estates, discussed in 1 Jarm. Wills, p. 709, *et seq.*, 4th ed. If a testator wishes that his trust estates should go to particular persons, he can appoint them executors for that special purpose: see Wms. Exors. 387, 8th ed.; but see *Re Parker's Trusts*, 1894, 1 Ch. 707.

Every will should now contain a devise to the executors of all copyhold or customary land held on trust or by way of mortgage.

As to the s. of the Land Transfer Act, 1875, repealed by this s., see note to V. & P. A., s. 5.

VII.—TRUSTEES AND EXECUTORS.

S. 31.

TRUSTEES AND
EXECUTORS.

The following ss., 31–38 (both inclusive), are repealed, and in substance re-enacted, by the T. A.; but it may be useful to print them here for purposes of reference.

31.—(1.) *Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.*

*Appointment of
new trustees,
vesting of trust
property, &c.*

(2.) *On an appointment of a new trustee, the number of trustees may be increased.*

(3.) *On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.*

(4.) *On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.*

(5.) *Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as*

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if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) *The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.*

(7.) *This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

(8.) *This section applies to trusts created either before or after the commencement of this Act.*

See now T. A., s. 10, which extends the powers of this s. to the case of a trustee desiring to be discharged; from "all or any of the trusts or powers reposed in or conferred on him," and embodies C. A., 1882, s. 5; C. A., 1892, s. 6.

*Retirement of
trustee.*

32.—(1.) *Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.*

(2.) *Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.*

(3.) *This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to any provisions therein contained.*

(4.) *This section applies to trusts created either before or after the commencement of this Act.*

See now T. A., s. 11.

33.—(1.) *Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.*

SS. 33, 34.

TRUSTEES AND
EXECUTORS.

Powers of new
trustees
appointed by
court.

(2.) *This section applies to appointments made either before or after the commencement of this Act.*

See now T. A., s. 37.

34.—(1.) *Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.*

Vesting of
trust property
in new or
continuing
trustees.

(2.) *Where a deed by which a retiring trustee is discharged under this Act, contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.*

(3.) *This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.*

(4.) *For purposes of registration of the deed in any*

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registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

See now T. A., s. 12.

*Power for
trustees for
sale to sell
by auction, &c.*

35.—(1.) *Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.*

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

See now T. A., s. 13.

*Trustees'
receipts.*

36.—(1.) *The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof.*

(2.) This section applies to trusts created either before or after the commencement of this Act.

See now T. A., s. 20.

37.—(1.) *An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.*

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(2.) *An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.*

Power for
executors and
trustees to
compound, &c.

(3.) *As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.*

(4.) *This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.*

See now T. A., s. 21, which extends the powers of this section to administrators.

38.—(1.) *Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.*

Powers to two
or more
executors or
trustees.

(2.) *This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.*

See now T. A., s. 22.

S. 39.

MARRIED
WOMEN.

VIII.—MARRIED WOMEN.

Power for
Court to bind
interest of
married
woman.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Effect of a
separation or
protection
order.

An order under 20 & 21 Vict. c. 85, s. 21, or s. 25, or 41 & 42 Vict. c. 19, s. 4, does not apply to separate estate existing at the date of the desertion or separation, so as to put an end to restraint on anticipation: see *Waite v. Morland*, 38 Ch. D. 135; *Hill v. Cooper*, 1893, 2 Q. B. 85. But it does so apply as to separate estate accruing afterwards: see those two cases, and *Cooke v. Fuller*, 28 Beav. 99; *Munt v. Glynes*, 41 L. J. Ch. 639. Though separate estate does not require the protection of an order, the words of s. 25 seem to lead to this result, as to such after-acquired separate estate.

As to the jurisdiction of the Court, acting under its statutory powers of directing, in matrimonial causes, a settlement of the wife's property, to deal with an existing restraint on anticipation, see *Michell v. Michell*, 1891, 1 P. 208. It can do so only in the cases covered by s. 5 of 22 & 23 Vict. c. 61.

Power of
Divorce
Court to
dispense with
restraint on
anticipation.
Cases affected.

Before this Act the Court had no power—except by way of sanctioning a compromise of proceedings, see Seton, 5th ed. 790; *Wilton v. Hill*, 25 L. J. Ch. 156; *Wall v. Rogers*, 9 Eq. 58—to bind the interest of a married woman who was restrained from anticipation, however beneficial it might be to her to do so: see *Robinson v. Wheelwright*, 21 Beav. 214, 6 D. M. & G. 535; *Tussaud v. Tussaud*, 9 Ch. D. 375, *per James, L.J.*; *Smith v. Lucas*, 18 Ch. D. 531.

Applications
under this s.

Applications under this s. must be made by summons in Chambers, s. 69 (3), and not by petition: *Re Lillwall's Settlement*, 30 W. R. 243, W. N., 1882, 6; *Latham v. Latham*, W. N., 1889, 171.

See on the intention of this s., *Tamplin v. Miller*, W. N., 1882, 44; *Re Warren's Settlement*, 52 L. J. Ch. 928, W. N., 1883, 125; and see orders made under this s. in *Ex parte Thompson*, W. N., 1884, 28; *Sedgwick v. Thomas*, 48 L. T. 100; *Musgrave v. Sandeman*, *ib.* 215; *Re Flood's Trusts*, 11 L. R. Ir. 355; *Re Wright's Trusts*, 15 *ib.* 331; *Re Seagrave's Trusts*, 17 *ib.* 373; *Hodges v. Hodges*, 20 Ch. D. 749; *Re Little's Will*, 36 *ib.* 701; *Re Currey, Gibson v. Way*, W. N., 1887, 28, 32 Ch. D. 365; *C's Settlement*, 56 L. J. Ch. 556, and *Re Milner's Settlement*, 1891, 3 Ch. 547; but refused in *Re Warren's Settlement*, *ubi sup.*; *Re Wheatley*, *Smith v. Spence*, 27 Ch. D. 606; *Re Jordan*, *Kino v. Picard*, 34 W. R. 270, W. N., 1886, 6; and *Re Little, Harrison v. Harrison*, 40 Ch. D. 418; *Re S's Settlement*, W. N., 1893, 127.

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For forms of orders, see Seton, 5th ed., pp. 764-7.

SS. 39, 40, 41.

The consent of a married woman under this s. need not in all cases be ascertained by a separate examination: *Hodges v. Hodges*, 20 Ch. D. 749; *Harris v. Harford*, W. N., 1888, 190; *Musgrave v. Sandeman*, 48 L. T. 215.

MARRIED
WOMEN.

Service on the trustees for the married woman was dispensed with in *Re Little's Will*, 36 Ch. D. 701; and see *Re Typpett & Newbould*, 37 Ch. D. 444, where the order removing the restraint (if any) was made in the absence of the trustees (p. 445).

How consent
taken.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purposes of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

Power of
attorney of
married
woman.

(2.) This section applies only to deeds executed after the commencement of this Act.

As to a married woman's power of attorney under this s., see *Stewart v. Fletcher*, 38 Ch. D. 627, 628, and see S. C. as to form of order for payment of income of funds in Court, subject to restraint on anticipation, to the attorney of a married woman: see also Seton, 5th ed., p. 188, and Addenda, p. 2098.

This s. when originally inserted had more special reference to the clauses struck out in the House of Commons enabling married women to convey by deed simply without acknowledgment. An acknowledged deed is necessarily incapable of being executed by attorney, but under this s. a power of attorney will be effectual as regards all other deeds or acts capable of being executed or done by a married woman.

IX.—INFANTS.

INFANTS.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

Sales and leases
on behalf of
infant owner.
40 & 41 Vict.
c. 18.

This s. enables the Court for the benefit of an infant to sell his fee simple estate, not only where he has acquired it under a settlement (see definition of "settlement" in the S. E. A., 1877, and compare 27 & 28 Vict. c. 45, s. 3—passed to meet *Re Birtle*, 11 W. R. 739; *Re*

Sale of infant's
land in fee
simple.

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Leases and sales
of infant's
land
generally.

Marq. of Ailesbury & Lord Iveagh, 1893, 2 Ch. 345, pp. 354, 355), but also where it has come to him by descent or devise in fee. Before this Act the Court had no authority to sell the real estate of an infant upon the mere ground that a sale would be beneficial: *Calvert v. Godfrey*, 6 Beav. 97; except, perhaps, to sell part, so as to save the rest: see *In re Jackson*, 21 Ch. D. 786; *Re De Teissier's S. E.*, 1893, 1 Ch. 153, 163.

It also enables the Court to authorize leases and sales of the infant's freehold and leasehold land, and it is conceived that the guardians of an infant may under this s., and ss. 46 and 49 of the S. E. A., 1877, grant leases for twenty-one years of the infant's land without the authority of the Court. As to the power of the Court to authorize leases of infant's land under 11 Geo. 4 and 1 Will. 4, c. 65, see Simpson on Infants, 2nd ed., 368, and *Re Letchford*, 2 Ch. D. 719, where the Court held the leasing power under that Act applied, though the infant was entitled in reversion only.

This s. applies, though the infant is entitled in contingency only: *Re Liddell*, 52 L. J. Ch. 207; *Re Sparrow's S. E.*, 1892, 1 Ch. 412.

All the powers of the S. E. A., 1877, may be executed by the guardians on behalf of the infant (s. 49).

Leases, sales, &c., of land to which an infant is in his own right absolutely entitled in possession may now be effected under S. L. A., 1882: see ss. 59, 60.

Management
of land and
receipt and
application of
income during
minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

Meaning of
settlement.

Applies where
legal estate
vested in
trustees.

The word "settlement" includes all settlements by whatever instrument made, whether deed, will, writing, or Act of Parliament; this is clear from suba. 7 of this s., which refers to the instrument by which the settlement is made, and from the definition of "instrument," s. 2 (xiii.).

This s. includes the case where an infant takes by descent, also

where the legal estate is vested in trustees upon trust to pay the rents and profits to an infant. By s. 2 (iii.) possession includes receipt of income, and income includes rents and profits.

The trustees appear to take no estate under this power: see *Dean v. Dean*, 1891, 3 Ch. 150, 157; *Griggs v. Gibson*, 14 W. R. 819.

The mother is now a guardian under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27).

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—
INFANTS.
—

Mother a
guardian.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

As to these terms and restrictions, see *Honywood v. Honnywood*, 18 Eq. 306; *Dashwood v. Magniac*, 1891, 3 Ch. 306.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

For the Court's powers to direct money to be raised for the cost of necessary repairs of property to which an infant is absolutely entitled, see *Re Jackson*, 21 Ch. D. 786; *Conway v. Fenton*, 40 Ch. D. 512; *Re De Teissier's S. E.*, 1893, 1 Ch. 165.

Cost of repairs
thrown on
capital.

(4.) The trustees may apply at discretion any income

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 ———
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 ———

which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

Payment of
 income to
 parent or
 guardian.

The power in this subs. and in s. 43 (i.) to pay income to the parent or guardian for the infant's maintenance, education, or benefit, necessarily implies a power for the parent or guardian to give receipts, and exempts a person paying from seeing to the application of the money, just as a like power to trustees is necessarily implied where they are directed to sell land and divide the proceeds amongst infants (*Sowarsby v. Lacy*, 4 Mad. 142; *Lavender v. Stanton*, 6 Mad. 46). Where the father is living the amount to be allowed for maintenance is in the discretion of the trustees: *Wilson v. Turner*, 22 Ch. D. 521; *Re Lofthouse*, 29 ib. 932. But a trustee who is also one of two guardians cannot discharge himself from his duty as guardian by payment of the income to his co-guardian; strict voucher of items is not required, but a proper sum will be allowed: *Re Evans, Welch v. Channell*, 26 Ch. D. 58, 63.

Maintenance
 while father
 alive.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

- (i.) If the infant attains the age of twenty-one years, then in trust for the infant;
- (ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but
- (iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement,

tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal estate;

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INFANTS.

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

This s. goes somewhat beyond what can be done by deed. The trust extends over the minority of a tenant in tail by descent, as well as the minority of a tenant in tail by purchase, which in a deed or will would be a void trust (see 1 Jarman, 274, 4th ed.). To this there is practically no objection, as the same accumulation would take place by operation of law or under the direction of the Court in an administration action. Under subs. 5 the trust for disposal of the proceeds of accumulation is strictly confined within what could be done by deed or will.

How far this s. agrees with the usual form.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the

Application by trustees of income of property of infant for maintenance, &c.

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trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Does not apply where vesting is after 21.

This s. does not apply to property the vesting of which is or may be postponed beyond the age of twenty-one years: *Judkin's Trusts*, 25 Ch. D. 743. In all such cases where the vesting is so postponed, maintenance, education, and accumulation clauses are still necessary.

As to the implied power of the parent or guardian to give receipts for income and as to the allowance for maintenance where the father is living, see n. to s. 42 (4); and as to controlling the discretion of a trustee in regard to maintenance and education as long as the discretion is honestly exercised, see *Re Lofthouse*, 29 Ch. D. 921; *Re Bryant*, 1894, 1 Ch. 324.

A gift of residue to an infant makes the executor a trustee within this s., when the residue is ascertained: *Re Smith*, 42 Ch. D. 302.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold these accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

Past maintenance.

Under this and the preceding subs. trustees may apply past accumulations in payment of past maintenance: *Re Pitts' Settlement*, *Collins v. Pitts*, W. N., 1884, 225; but see S. C. *ib.* 242.

Fund vested subject to be divested.

Accumulations of income of property vested, but subject to be divested on death under twenty-one, have been held to be part of the infant's estate on his dying under that age: *Re Buckley's Estate*, 22 Ch. D. 583 (decided on s. 26 of 23 & 24 Vict. c. 145, the latter clause of which is the same as in this subs.); *Re Humphreys*, 1893, 3 Ch. 1, which arrives at the result on consideration of subs. 3.

Infant tenant for life.

And accumulations of income of a share of which an infant contingently on her attaining twenty-one was tenant for life, were paid to her at twenty-one as the person ultimately entitled to the property

from which they arose: *Re Wells*, 43 Ch. D. 281; but see *Re Humphreys*, *ubi sup.*, which, though it approves of the decision in *Re Wells*, suggests a different reason for it.

For investments of trust money authorized by law, see T. A., T. A. 1894, *infra*.

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—

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

A direction to accumulate the income of shares given to infants contingently on attaining twenty-one, and to pay the same to them as and when their presumptive shares become payable, is not a contrary intention excluding the operation of subs. 1: *Re Thatcher's Trusts*, 26 Ch. D. 426; and see *Re Dickson*, 29 *ib.* 331, 338-9; *Re Humphreys*, *ubi sup.* “Contrary intention.”

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

Under s. 26 of Lord Cranworth's Act, the expression income to which such infant “may be entitled” was held to mean “may be or become entitled,” so as to include income accruing on a fund to which an infant was contingently entitled (*Re Cotton*, 1 Ch. D. 232), but where no income was accruing before the contingency the s. did not apply (*Re George*, 5 Ch. D. 837). The same holds good under this s. of this Act: *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Dickson*, *Hill v. Grant*, 28 Ch. D. 291, 29 *ib.* 334. But if the legacy is directed to be set apart (for the benefit of the legatees and not merely for the convenience of the residuary estate: see *Re Inman*, 1893, 3 Ch. 518; *Re Snaith*, 38 Solicitors' Jour. 564), the income may be applied under this s. (*Johnston v. O'Neill*, 3 L. R. Ir. 476; *Re Medlock's Trusts*, *Ruffle v. Medlock*, 55 L. J. Ch. 738; W. N., 1886, 111); and that, whether the legacy is specific or only pecuniary: *Re Clements*, 1894, 1 Ch. 665. Nor does this s. apply where the whole income is subject to a prior express trust for accumulation: *Re Alford*, *Hunt v. Parry*, 32 Ch. D. 383.

Applies to cases only where income goes with capital.

In the case of a pecuniary legacy to an infant contingent on his attaining twenty-one, and carrying interest in the meantime, the executors are bound to set it apart, and would but for this s. accumulate the whole income. The effect of this s. is that, in the absence of any direction to the contrary, if the infant dies under twenty-one the residuary legatee takes only the accumulations representing the residue of the income not applied under it. On the other hand, if no interest is payable on the legacy till the infant attains twenty-one, there is no

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income to which the s. can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested. The short effect of the s. seems capable of being stated thus: Where the income will go along with the capital if and when the capital vests, then the income is applicable under the s. for the benefit of the infant, otherwise not.

And the Court of Appeal has held in *Re Holford*, 1894, 3 Ch. 30 (overruling *Re Jeffery*, 1891, 1 Ch. 671), that where there is a gift to several, contingently on attaining twenty-one, the member of the class who first attains twenty-one does not then become entitled to the income of the whole fund, until the next share in the corpus of the fund vests; but those under twenty-one can still be maintained, under this s., out of the income of their contingent shares: and see *Rochford v. Hackman*, 9 Ha. 475, 485.

The tacit incorporation of this s. in a gift of residue among the testator's infant children, who also take contingent legacies under the will, does not displace the rule that the legacies carry interest from the testator's death: *Re Moody*, 1895, 1 Ch. 101.

Difference
between ss. 42
and 43.

S. 42 authorizes the application of the rents and profits of land as defined by s. 2 (ii.) for the maintenance, education, or benefit of an infant only where the instrument under which the interest of the infant arises comes into operation after 1881, but s. 43 applies to any property as defined by s. 2 (i.), whether the instrument comes into operation after 1881 or not.

RENT-CHARGES
AND OTHER
ANNUAL SUMS.

Remedies for
recovery of
annual sums
charged on
land.

X.—RENT-CHARGES AND OTHER ANNUAL SUMS.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person

entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

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RENT-CHARGES
AND OTHER
ANNUAL SUMS.

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ANNUAL SUMS.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

How agrees
with usual
form.

This s. gives the ordinary remedy for enforcing payment of a rent-charge, except that instead of a term, power only is given to limit a term. The remedy by means of a term is rarely wanted, and if wanted the term can be created. Where by reason of a lease being prior in date to the limitation of a rent-charge, or being granted under a power which gives it priority to a rent-charge, the lessee's title is paramount to the rent-charge, the remedy by distress is not available, and the lessee is only liable to pay his rent to the reversioner. Hence the necessity for a term.

Why a term
necessary.

The remedies given by this s. do not prevent recourse to other remedies: *Searle v. Cooke*, 43 Ch. D. 519.

Redemption of
quit-rents and
other per-
petual charges.

45.—(1.) Where there is a quit-rent, chief-rent, rent-charge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

The Board of Agriculture is now charged with this duty: see Board of Agriculture Act, 1889, s. 2.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

Trust for, or
power of, sale.

The Board act under this subs. in cases where there is a power of sale in trustees of a settlement, or in the tenant for life under the Settled Land Acts. The tenant for life and the trustees are together the persons entitled to the rent, to whom the notice is to be given.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

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RENT-CHARGES
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ANNUAL SUMS.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rent-charge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

The rents referred to in this s., except a perpetual rent-charge or annuity, are incidents of tenure, and would not be incumbrances within s. 5.

The Board require an application in writing, but not in any special form, signed by the owner of the land, or some person interested therein; the application should contain a statement of the facts sufficient to show that the application is within the s.

Procedure
under the s.

In the absence of special circumstances, twenty-five years' purchase of the rent is the usual consideration for redemption fixed by the Board.

The office fee for the certificate under subs. 1 is 10s. No further fee is charged for the certificate under subs. 3.

The Board do not deal with the expenses of the application.

The entire expense of redeeming the rent necessarily falls on the person redeeming. He has to procure the certificate of the Board as to the amount to be paid, and as to payment or tender of that amount. The person entitled to the rent has only to receive the redemption money.

On whom
expense falls.

As to obtaining apportionment of rents mentioned in this s., see 17 & 18 Vict. c. 97, ss. 10-14.

Apportion-
ment.

XI.—POWERS OF ATTORNEY.

POWERS OF ATTORNEY.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his

Execution
under power
of attorney.

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SS. 46, 47.

POWERS OF
ATTORNEY.

own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

This s. had especial reference to clauses which were struck out of the Bill in the House of Commons, but which are now contained in the C. A., 1882, ss. 8 and 9.

The execution after 1881 of an instrument by an attorney in his own name will not be invalid. It is not necessary, though proper, to express that he executes as attorney, or on behalf of his principal.

The provision as to the donee using his own seal would seem to apply where a Corporation has appointed an attorney.

Payment by
attorney
under power
without notice
of death, &c.,
good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation, was not at the time of the payment or act known to the person making or doing the same.

Winding-up of
company.

Winding-up proceedings are not a revocation of a power of attorney, without notice of them: see *Re Oriental Bank*, 28 Ch. D. 634, 640. The law there laid down by Chitty, J., leads to the conclusion that "bankruptcy" in s. 2 (xv.), *supra*, does not include winding-up proceedings.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

"By," in the marginal note, should be "to."

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This s. is supplementary to the T. A., s. 23, which replaces 22 & 23 Vict. c. 35, s. 26, and applies only to trustees, executors, and administrators: see s. 50 of the later Act.

And as to notice being necessary, apart from statute, in order to terminate an agent's authority—except in case of bankruptcy or death—see *Re Oriental Bank*, 28 Ch. D. 634, 640.

Further provision is made for powers of attorney by ss. 8 and 9 of the C. A., 1882. It is still necessary for a purchaser taking a conveyance under power of attorney not made in accordance with that Act, to ascertain that the principal is alive at the time of execution of the conveyance. But this s. seems to enable the attorney to give a valid discharge for the purchase-money, so that where the contract is binding on the vendor, the purchaser would obtain a good equitable title. The legal estate would remain outstanding, but a conveyance could be obtained from the personal representatives under s. 4 or s. 30 of this Act. Notwithstanding this s., it will be best still to continue the old practice of depositing or retaining the purchase-money until it is ascertained that the vendor survived the date of execution by his attorney, unless the power can be and is made absolutely irrevocable under s. 8 of C. A., 1882, or made irrevocable for a specified period under s. 9 of that Act, and in the latter case the execution by the attorney must be within the specified period.

SS. 47, 48.

POWERS OF
ATTORNEY.

As to completing purchase under power of attorney under this s.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

Deposit of original instruments creating powers of attorney.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

It is the practise of the Central Office to apply this subs. only to copies presented at the time of depositing the power. Copies afterwards wanted must be bespoken and made in the Central Office: see the Rule under this s., *infra*, ch. v., and the Annual Practice for 1894, vol. ii., p. 361.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the

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SS. 48, 49, 50. contents of the instrument and of the deposit thereof in the Central Office.

POWERS OF
ATTORNEY.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.

See Rule under this s., *infra*, ch. v.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

There is always a difficulty in securing the production of a general power of attorney for the benefit of those whose rights depend on an exercise of the power, the original document being necessarily retained for subsequent use. Under this s. the original may be deposited, and may be inspected and an office copy may be obtained.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Use of word
"grant" un-
necessary.

XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

49.—(1.) It is hereby declared that the use of the word "grant" is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this Act.

As to necessity
for word
"grant."

Since the Act 8 & 9 Vict. c. 106, s. 2, enabled land in possession to be conveyed by grant, it has been the practice to use that word in conveyances of freehold land, though probably not necessary, if the intent to pass the estate is clear (see *Chester v. Willan*, 2 Wms. Saund. 96a (1); *Shove v. Pincke*, 5 T. R. 124). This s. removes any question as to the necessity of so doing. The word "convey" may be used where convenient as to both freeholds and leaseholds (see s. 2 (v.), s. 57, and Forms in Fourth Schedule of this Act). It is not necessary to use the word "grant" except where it implies covenants under Acts of Parliament, as under s. 32 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

Conveyance by
a person to
himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by

a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

The first part of this s. is supplementary to 22 & 23 Vict. c. 35, s. 21 (which applies only to personal property), and is only intended to apply to a conveyance in joint tenancy, as in the ordinary case of the appointment of a new trustee. If land conveyed by A. is to be held in common by himself and B., the proper course is either for A. to convey an undivided share to B., or to convey the entirety to B. to the use of himself and B. as tenants in common. The latter form would be adopted only to make covenants run with the land; but query if covenants implied under s. 7 would run with A.'s moiety: see note on that s., subs. (1), *suprà*.

It will be borne in mind in reading this and other ss. of the Act that the singular includes the plural, the plural the singular, and the masculine gender includes the feminine, unless the contrary is expressly provided: see the Interpretation Act, 1889, s. 1.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

See this s. illustrated in the 4th Schedule, Form IV.

The principal effect of this s. is to shorten the expressions required in a deed to create estates tail and cross remainders. There still remains the distinction between deeds and wills, that in a will many expressions, such as "A. and his assigns for ever," "A. and his issue," &c., will create an estate of inheritance, but in a deed no words are sufficient except either the old technical words or the words authorized by this s. And see, as to this being the case in conveyances of equitable as well as legal interests, *Re Whiston's Settlement*, 1894, 1 Ch. 661.

This s. applies only to deeds, therefore a surrender of copyholds should be made in the same terms according to the custom as before the Act.

There seems to be no ground for the doubt expressed in Coppinger and Munro on Rents (pp. 45, 46) that this s. does not apply to a rent-charge.

SS. 50, 51.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

How land to
be conveyed
to tenants in
common.

Singular in-
cludes plural
and masculine
feminine.

Words of
limitation in
fee or in tail.

Short expres-
sion for estate
tail, &c.

Surrender of
copyholds to
be expressed as
heretofore.

This s. applies
to a rent-
charge.

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SS. 51, 52.
 CONSTRUCTION
 AND EFFECT
 OF DEEDS AND
 OTHER IN-
 STRUMENTS.

The construction of words creating a use has always been the same as that of words creating a common law estate, and there can be an estate in a rent-charge. The word "estate" is used in this way in s. 5 of the Statute of Uses (27 Hen. 8, c. 10) in reference to a rent-charge created by way of use. S. 51 of this Act allows a new mode of describing legally the quantum of estate, and applies to an interest newly created as well as pre-existing. If not, the s. would be nugatory as regards an estate tail which, like a rent-charge, is always newly created. S. 5 of the Statute of Uses does not expressly authorize the execution of the use in a rent-charge for an estate tail, but nobody has ever doubted that in effect it does. The recital (see words "special time," which cover the present case) and the enactment are quite general.

Powers simply
 collateral.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Power coupled
 with a duty.

This s. removes the difficulty which arose from the indestructibility of powers simply collateral, that is, powers given to a person, not taking any estate, to dispose of or charge the estate in favour of some other person (see Sug. Powers, 8th ed., 49). But a power coupled with a duty cannot be released: *Re Eyre, Eyre v. Eyre*, 49 L. T. 259, W. N., 1883, 153; *Weller v. Ker*, L. R. 1 Sc. App. 11; *Palmer v. Locke*, 15 Ch. D. 294; *Re Little*, 40 Ch. D. 418; Williams on Real Property, 12th ed., 311.

The ordinary power of appointment among children or issue, given to a tenant for life in a settlement, is not such a power coupled with a duty; and the donee of the power, entitled in reversion on his own life interest to a child's share in default of appointment, can release the power, and, on surrendering his life interest, call for transfer of the share: *Re Radcliffe*, 1892, 1 Ch. 227.

Married
 women.

A married woman is a person (see 13 & 14 Vict. c. 21, s. 4; the Interpretation Act, 1889, s. 1); but it may be doubted whether this s. enables her to release a power which, without it, she could not release. It has been held (see *Re Radcliffe*, 1891, 2 Ch. 662, 670) that the s. is declaratory merely. Under s. 77 of the Fines and Recoveries Act, she could by deed acknowledged, in which her husband concurs, release or extinguish any power vested in her in regard to land; and by s. 1 of Malins' Act, 20 & 21 Vict. c. 57, she could in like manner release a power in regard to personal estate to which she was entitled under an instrument (not being her own marriage settlement) made after 31st December, 1857. Those enactments may seem to show that the Legislature considered its interference necessary to enable her to release a power (and see Sugden on Powers, 8th ed., p. 92); but on

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the other hand she was incapable of releasing any right unless enabled to do so by statute. SS. 52, 53, 54.

Having regard to Part VIII. of this Act, which expressly deals with married women, it may be held that this s. only removes general disability, and does not otherwise affect the peculiar position of a married woman : compare *Beresford-Hope v. Lady Sandhurst*, 23 Q. B. D. 79; *De Souza v. Cobden*, 1891, 1 Q. B. 687. See, however, *contra*, *Farwell on Powers*, 2nd ed., p. 18; *Re Davenport*, W. N., 1894, 225. 1891-1, Q.B. 501.

The M. W. P. A. does not seem to make a married woman a *feme sole* for the purpose of releasing a power.

As to disclaimer of powers, see C. A., 1882, s. 6.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Disclaimer of
powers.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

Construction
of supple-
mental deed.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

The enactment in this s., though not necessary, seemed required to introduce the practice of using, instead of an indorsed deed, a separate deed in a similar form referring to but not reciting the previous deed. The reference to the previous deed need only be such as clearly to identify it. For this purpose the date and the parties, with some explanation of the nature of the principal deed in order to make the supplemental deed intelligible, will be sufficient (see 4th Schedule, Form II.). If deeds be made up bookwise in a form now common, the supplemental deed can be attached after execution, and both together will be easily readable. A further charge cannot as a general rule be made by indorsement on the mortgage deed, which the mortgagee will not allow out of his possession, but a supplemental deed of further charge can be sent to the mortgagor for execution, and afterwards annexed by the mortgagee to his mortgage deed, without letting the latter go out of his possession.

Practical use
of this s.

This s. only speaks of a deed supplemental to another deed, but any document may also be made supplemental to a deed or will or to any other document.

Any document
may be sup-
plemental.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

Receipt in deed
sufficient.

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SS. 54, 55, 56.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Receipt in deed
or indorsed,
evidence for
subsequent
purchaser.

(2.) This section applies only to deeds executed after the commencement of this Act.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

Effect of receipt
in body of deed.

This and the preceding s. make the receipt in the body of a deed executed after 1881 sufficient evidence of payment. Formerly that receipt was in equity little more than a mere form: see *Kennedy v. Green*, 3 My. & K. 699, 716; *Greenslade v. Dare*, 20 Beav. 284, 292.

There must be something more than a general statement that consideration has been given; specific sums or items must be mentioned to give a receipt for consideration its statutory effect under this s.: see *Renner v. Tolley*, W. N., 1893, 90 (but query, was any receipt necessary? the money was in the lease stated "to have been expended," and was not paid to the lessor. He could not acknowledge the receipt).

Receipt in deed
or indorsed,
authority for
payment to
solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

This s. meets the dictum of L.J. Turner in *Viney v. Chaplin*, 2 De G. & J. 468, 482, making an additional document necessary where the purchase-money was to be paid to the vendor's solicitor, namely, an express authority to pay to him: see also *Ex parte Swinbanks*, 11 Ch. D. 525.

It makes no alteration in the mode of procedure on the completion of a purchase, but only gives an additional security to a purchaser. The absence of a written authority to a solicitor to receive consideration money was never relied on in practice as preventing payment. Each person entitled to receive acted as if the execution by him of the deed and indorsed receipt enabled the producer of the deed so executed to receive without further authority. This was supposed to be the law before *Viney v. Chaplin*, and is now the law in reality. In practice it is perfectly well known to all parties who is the solicitor acting for each person, and entitled to receive (in fact, on a sale, the vendor's solicitor is usually named in the conditions or contract); the payment will be made to him, and a purchaser knowingly making payment to the wrong person would not be absolved by this s. If any one of several persons entitled to receive chooses not to let the deed out of his possession, when executed by him, his only course is to attend on completion.

Ss. 54 and 56 render unnecessary the indorsed receipt and the separate authority to pay, and prevent the difficulty and delay sometimes caused by the omission to sign an indorsed receipt. The one receipt now required may be either in the body of the deed or indorsed.

In case of large purchases payment of the deposit by cheque is a reasonable practice, though the vendor sells in a fiduciary character; *Farrar v. Lacy*, 25 Ch. D. 636; 31 *ib.* 42.

This s. has now been extended to the case of trustees who are vendors (see T. A., s. 17 (1)), and who were held not to be within it unless they had power to authorize payment to their solicitor: *Re Bellamy & Metropolitan B. of W.*, 24 Ch. D. 387; *Re Flower and the same*, 27 *ib.* 592.

The solicitor producing the deed must be acting for the person signing the receipt therein, and must produce the deed and not merely have it in his possession: *Day v. Woolwich, &c., Society*, 40 Ch. D. 491; approved in *Re Helling & Merton*, 1893, 3 Ch. 269.

Where trustees are dividing trust funds and paying to the beneficiaries their shares, it seems doubtful whether this s. authorizes payment of a share to a solicitor producing a deed of release. The trustees are bound to pay, and the payment can scarcely be taken as the consideration for the release which is consequent on due payment being or having been already made.

57.—Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

The forms referred to are not in any way directory. They are merely illustrative of the modes in which the Act may be applied in practice.

SS. 56, 57.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Practice not
altered.

Where trustees
are vendors.

Solicitor must
act for person
receiving.

Whether s.
applies to
release.

Sufficiency of
forms in
Fourth
Schedule.

S. 58.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Covenants to
bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

Benefit of
real covenants.

This s. renders unnecessary the mention of "heirs and assigns," or "executors, administrators, and assigns," of the covenantee for the purpose of making the benefit of a covenant run with the land, but it does not make a covenant so run where it would not so run if the "heirs and assigns," or "executors, administrators, and assigns" were expressed.

"Assigns" includes persons taking by devise or bequest—"testamentary assigns"—see cases cited in n. to s. 30, *supra*.

Cases where
"assigns"
must be
mentioned.

Covenants not
between
landlord and
tenant where
assigns have
notice.

In the case of a lease s. 10 annexes to the reversion the *benefit* of all the *lessee's* covenants, and so gives this benefit to "assigns" though not mentioned, and also though the covenant be not entered into with the reversioner, as where the lessor has a mere power; and s. 11 annexes the *obligation* of a *lessor's* covenant to the reversionary estate, and so binds assigns though not mentioned where the lessor has power to bind that estate. In all other cases the obligation of a covenant relating to land is carried no further than before the Act, and to bind the "assigns" they must still be mentioned where mention was necessary before the Act, for instance, in a lease where the covenant concerns a thing not *in esse* at the time of the demise, as to build a wall (*Spencer's Case*, 1 Smith L. C. 66, 9th ed., Woodfall L. & T. 162, 14th ed.). In cases other than those between landlord and tenant it is doubtful whether the obligation of any covenant not involving a grant runs with the land at law, independently of the Judicature Act, 1873 (36 & 37 Vict. c. 66, ss. 24, 25 (11); see *Austerberry v. Oldham*, 29 Ch. D. 750); but it does run in equity with notice (and unaffected by the rule against perpetuities, see *Mackenzie v. Childers*, 43 Ch. D. 265), where the intention is clear that the assigns should be bound: see *Tulk v. Moxhay*, 2 Ph. 774, where the assigns were mentioned; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463, where the assigns were not mentioned; and see *Re Fawcett & Holmes*, 42 Ch. D. 150, where they were mentioned in one part of the covenant, but not in another: and where the covenant is merely restrictive of the user of land, and can be enforced by injunction and imposes no pecuniary obligation

Haywood v. Brunswick Build. Soc., 8 Q. B. D. 403, 408; *London & S. W. Railway Co. v. Gomm*, 20 Ch. D. 563; *Austerberry v. Oldham*, 29 Ch. D. 750), except where it imposes an unreasonable burden on land, as in *Keppell v. Bailey*, 2 My. & K. 517, 535. The result seems to be that all covenants, where the burden is intended to run with the land, should be made by the covenantor for himself and his assigns.

As to the benefit running in equity, see *Keates v. Lyon*, 4 Ch. 218; *Renals v. Cowlishaw*, 9 Ch. D. 125; 11 Ch. D. 866; *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Q. B. D. 261; 16 *ib.* 778; *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750, 775-8, 780, 784; and as to the result where the land comes to be split up among a number of separate assigns, see *Everett v. Remington*, 1892, 3 Ch. 148.

SS. 58, 59.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Burden of real
covenants.

Benefit in
equity.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the person making the same, as if heirs were expressed.

Covenants to
extend to heirs,
&c.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Though by the Act 32 & 33 Vict. c. 46, specialty debts binding the heirs rank no higher in the administration of assets than other debts against the land, there is still, under 11 Geo. 4 and 1 Will. 4, c. 47, ss. 6 and 8, the power to sue the heir or devisee personally for such debts, and obtain judgment against him to the extent of the assets which have devolved on him: see *Re Hedgely*, 34 Ch. D. 379. Accordingly a creditor having so obtained judgment takes priority of other creditors against the land, and recovers without any necessity for probate or letters of administration, which are only required to support proceedings in an administration action. All covenants will now bind the heir or devisee so as to enable an action to be brought against him personally, though the heir is not expressly mentioned. It has always been unnecessary expressly to mention executors or administrators.

Priority of
creditor by
specialty.

S. 60.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Effect of cove-
nant with two
or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of ss.
58-60.

This s. must be read in connection with ss. 58 and 59. The effect of the three last preceding ss. taken together, is that every covenant may now be made in the simple form: "A. hereby covenants with B. that," &c.; or "A. hereby covenants with B. and C. that," &c., except covenants relating to land the burden of which is intended to run with the land, and in such covenants, for the reasons given in the note to s. 58, A. should covenant for himself and his assigns. The covenant will thus bind the heirs, and where relating to land of any tenure the benefit of it will run with the land as if the old full form applicable to the case had been used; but where the burden is intended to run with the land the assigns of the covenantor and the land to be burdened should be mentioned. Further it will be sufficient as regards the acts to be done under the covenant, to say "that A. will pay to B." or "that A. will at the request of B. do all such acts," &c.; "that A. will pay to B. and C.," or "that A. will at the request of B. and C. do all such acts," &c. Under covenants in this form the heirs, or assigns of B. (in case, for instance, of a covenant to pay rent of freehold land to B. the lessor), or the executors or administrators of B. (as in case of a mortgage debt payable to B.) will stand precisely in the place of B. Also the survivor of B. and C., or the heirs or assigns, or the executors, administrators, or assigns of such survivor, as the case may be, will stand precisely in the place of B. and C. as if the old full form of covenant had been used. Thus not only are all covenants greatly shortened, but the form of a covenant with several

persons is reduced to that of a covenant with one person. The same principle applies to any contract under seal, as, for instance, the proviso for redemption or the proviso for reduction of the rate of interest on a mortgage, and to contracts in a marriage settlement.

As to covenants, apart from this enactment, being "measured and moulded according to the interests of the covenantees," see the authorities cited in *White v. Tyndall*, 13 App. Ca. 263.

SS. 60, 61.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

Effect of ad-
vance on joint
account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

The ordinary joint account clause has two objects: (1) To rebut the presumption in equity that the money was advanced in equal shares, and to convert it into a joint advance; (2) The advance being originally joint, to enable the money, after the death of one of the persons making the advance, to be paid to the survivors or the survivor, or his representatives, without inquiry whether the joint

SS. 61, 62, 63.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

account had been severed, the clause operating in fact as a contract that a severance (if any) should not affect the right of the survivor to give a receipt. Both these objects are effected by the present s. The s. applies either where the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares, so that an expression of the joint account is not necessary, though it is convenient as a direct statement of the rights of the mortgagees. As between the mortgagees the joint account may be rebutted by evidence: *Re Jackson, Smith v. Sibthorpe*, 34 Ch. D. 732.

As to payment to some or one of the creditors before any death, see *Steeds v. Steeds*, 22 Q. B. D. 537.

Grant of ease-
ments, &c., by
way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

The Statute of Uses, 27 Hen. VIII. c. 10, s. 1 (by force, as it seems, of the words, "of and in such like estates"), enabled *estates* only to be raised by way of use, and s. 5 enabled rent-charges to be raised by way of use. The statute does not contain any s. applicable to the creation of other interests *de novo* (see *Beaudely v. Brook*, Cro. Jac. 189; Bac. Ab. Uses, F.), but s. 1 enabled them, when created for a freehold interest, to be conveyed to uses, as being hereditaments. Consequently under a conveyance to uses or under a power of sale and exchange, a right of way or other easement or liberty could not be created, but if in existence could be conveyed to uses.

No new kind of
easement can
be created.

"Deriving title" means by and according to law, consequently this s. does not confer any new power of transmitting title, nor enable the creation of any new kind of easement, or make assignable that which before this Act was not by law assignable. For instance, a right of way in gross cannot be created capable of assignment: see *Ackroyd v. Smith*, 10 C. B. 164. That there may be an "estate" in an incorporeal hereditament appears by the Statute of Uses, s. 5, which speaks of an estate in an annual rent.

Provision for
all the estate,
&c.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title,

interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

SS. 63, 64, 65.

CONSTRUCTION
AND EFFECT
OF DEEDS AND
OTHER IN-
STRUMENTS.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

The object of this s. is to abolish the "all estate" clause. The s. does not say that every conveyance shall be deemed to contain this clause, which might be inconsistent with the terms of conveyance, as the word "conveyance" includes "lease" (see s. 2 (v.)). It merely confirms a previously existing rule of law (see *Elphinstone on Interpretation of Deeds*, pp. 204-9), and applies the rule in the same cases, namely, where a contrary intention is not expressed. Even with an express "all estate" clause a lease could not pass the fee for want of the word "heirs" or "fee simple," and also because the premises would be controlled by the habendum: *Co. Lit.* 183 a; *Buckler's Case*, 2 *Co.* 55; *Shep. Touch.* 113.

"All estate" clause.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

Construction of implied covenants.

XIII.—LONG TERMS.

LONG TERMS.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent,

Enlargement of residue of long term into fee simple.

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S. 65.

LONG TERMS.

not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

Presumption
of release of a
rent.

The Statute of Limitations, 3 & 4 Will. 4, c. 27, does not apply to rent reserved on a lease (*Grant v. Ellis*, 2 M. & W. 113; Sugden, Real Prop. Stat. 36, 63, 2nd ed., and see *Irish Land Commission v. Grant*, 10 App. Ca. 14, 26), but before that Act presumption from lapse of time operated as a bar in cases where the old Act did not apply (*Doe v. Prosser*, Cowper, 217); and it is conceived that the same principle would hold now, so that after non-payment of rent for a long period it would be presumed to have been released: see *Eldridge v. Knott*, Cowper, 214; and compare *Re Lidiard and another and Broadley*, 42 Ch. D. 254; *Ecclesiastical Commissioners v. Parr*, 1894, 2 Q. B. 420, 432.

"No money
value."

A rent which, when received, has a money value, as a rent of three shillings, though it be not regularly paid, is not within this subs. (*Re Smith & Stott*, 29 Ch. D. 1009, n.); otherwise as to a rent of one silver penny if lawfully demanded: *Re Chapman & Hobbs*, *ib.* 1007.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

If the married woman was married after 1882, or if her beneficial interest in the term was acquired after 1882, she holds it as her separate property, whether so expressed or not, under the M. W. P. A., ss. 2 and 5, and her husband's concurrence is not necessary.

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative

of any deceased person, the term is vested, whether subject to any incumbrance or not; shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

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LONG TERMS.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

This s. enables the conversion into fee simple of a long term in a case where it is practically impossible that evidence of title to the reversion in fee could exist at the expiration of the term, at least where the reversion is not vested in a corporation, and where also if such evidence did exist the value of the reversion must be infinitesimally small at the time of conversion.

S. applies to cases where reversion has no appreciable value.

Before the Act 8 & 9 Vict. c. 106, a tortious fee, and for all practical purposes an actual fee, could be acquired by means of a feoffment: see 1 Sand. Uses, 30, 5th ed.; 2 *ib.* 14 *et seq.* But s. 4 of that Act took away the tortious effect of a feoffment, and rendered impossible the acquisition of a fee in place of a term. The usual origin of a long term is a mortgage by demise where the right of redemption has been foreclosed or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it.

Old mode of acquiring fee.

The power to convert into a fee is given to "any person beneficially entitled" "to possession" (see definition of "possession," s. 2 (iii.)). Thus a tenant for life, legal or equitable, and whether the land is "subject to any incumbrance or not," can effect the conversion. A trustee can only convert where the trust is active and he is in receipt of rent. Otherwise the beneficial owner is the person to convert. Thus a trustee under the usual trust for sale and conversion in a will would be the proper person to effect a conversion, but not the trustee under a settlement holding the term on trusts corresponding to the limitation of the freeholds. There the equitable tenant for life would be the proper person.

Who has power to convert.

Trustee.

A mortgagee cannot convert, as it would be improper to allow him to change the nature of his mortgagor's estate. But the mortgagor can convert, the conversion being no injury to the mortgagee.

Mortgagor but not mortgagee.

The effect of subs. 3 is to defeat the reversion in fee in the same way as on a disentail, so that the fee acquired by conversion is free from all dealings affecting the original fee.

Effect of conversion.

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LONG TERMS.

C. A., 1882,
s. 11.

Amendment
of enactment
respecting
long terms.

The term capable of being enlarged by this Act has been explained by the C. A., 1882, s. 11, which enacts that.

Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

- (i.) Any term liable to be determined by re-entry for condition broken; or
- (ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

It follows that if A. having a lease for 999 years at a substantial rent demised to B. for 500 years without rent, taking a fine, then neither A. under s. 65 of the Act of 1881, nor B. under s. 11 of the Act of 1882, could acquire the fee. The result would be the same if the lease for 999 years be not at a rent, but be liable to be determined by re-entry for condition broken. But if neither the lease nor the sub-lease be at a rent, nor be liable to be determined by re-entry for condition broken, then B. could acquire the fee, notwithstanding that his immediate reversion is not the freehold, and could thus defeat A.'s term. A. could also acquire the fee as being entitled to possession, which includes receipt of rents and profits, if any (s. 2 (iii.)), in right of his term (see s. 65 (2) (i.)), but having done so would be liable to have his estate defeated by the enlargement of B.'s term.

C. A., 1881, s.
65 continued.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for

value previously made by a person having a contingent or defeasible interest in the term, be liable to be and shall be conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

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Under subs. 5, where there has been no dealing for value with the ultimate beneficial interest in the term, and that interest has not become absolutely and indefeasibly vested (as where the term has been settled in the usual way, and no tenant in tail by purchase has attained twenty-one), the land on the enlargement of the term is for all purposes of descent, devise, &c., changed from leasehold to fee simple. It will no longer vest absolutely in the first tenant in tail who attains twenty-one, but will descend under the entail if not disentailed. This result is the same as that produced where leaseholds are sold under a power of sale and the proceeds invested in fee simple land.

Where no dealing tenure is changed ;

Where there has been a conveyance for value the effect of that conveyance is preserved. Thus suppose the settlement to be on A. for life, remainder to his sons successively in tail, remainder to C. in tail, remainder to D. in fee, A. has no son of age, the term has not become absolutely and indefeasibly vested in any person, therefore the estate in fee simple acquired by enlargement should be conveyed to the uses of the settlement, and in the meantime will devolve accordingly as to the equitable interest. But C. will become absolutely entitled to the term in case A. dies without having a son who attains the age of twenty-one, or who dies under that age leaving issue inheritable; and if C. has mortgaged this contingent interest, then the mortgagee will take the fee obtained by enlargement in the same event in which he would have taken the term, but the equity of redemption will devolve under the entail. If a son of A. attains twenty-one before the enlargement is effected, then he becomes absolutely and indefeasibly entitled to the term, and this subs. 5 does not apply, but under subs. 4 the fee acquired is subject to the same trusts as the term, that is, a trust for the son absolutely, and no disentail is required. Under a will the land will pass as freehold or leasehold, according to its tenure at the time of the testator's death.

contra where a conveyance for value.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

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SS. 65, 66.

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Saves the
right to mines
not vested in
surface owner.

Subs. 6 in effect gives to the owner of a fee simple obtained by enlargement the right to the mines in fee simple as well as the land, except in those cases where there is a possibility that the mines can be shown to be vested in some other person than the reversioner in fee.

Mines severed in right (as by conveyance separately from the land) will also be severed in fact, but the words "in fact" seem also required to save the title of a person in possession of mines without obliging him to show that they have been severed in right.

ADOPTION OF
ACT.

Protection of
solicitor and
trustees adopt-
ing Act.

XIV.—ADOPTION OF ACT.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor they shall also be protected in like manner.

Under this s. a solicitor adopting the Act and framing his drafts so as to incorporate the forms contained in the Act, or so as not to exclude any provisions of the Act, incurs no responsibility, those forms and provisions being by this s. declared proper. The same holds as to a trustee or executor. If he uses other forms his responsibility remains the same as before the Act.

Having regard to subs. 3, trustees and executors will probably always require the Act to be adopted, thereby obtaining express statutory protection.

SS. 66, 67.

ADOPTION OF
ACT.

Solicitor's
responsibility
in reference to
adoption of the
Act.

Adoption by
trustees.

XV.—MISCELLANEOUS.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

See *Cronin v. Rogers*, 1 Cab. & Ell. 348; and the form of the notices in *Lock v. Pearce*, 1892, 2 Ch. 328.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service

MISCELLA-
NEOUS.

Regulations
respecting
notice.

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SS. 67, 68, 69. shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

MISCELLANEOUS.

"Ordinary course."

Delivery under some special arrangement, though a permanent one, with the post-office authorities is not a delivery "in the ordinary course," so as to postpone the statutory date of service: see *Kemp v. Warklyn*, 1894, 1 Q. B. 583. Where there is no delivery "in the ordinary course," service by registered letter is not good: *Lewis v. Evans*, L. R., 10 C. P. 297.

(5.) This section does not apply to notices served in proceedings in the Court.

Service on mortgagor.

As to service on mortgagor of notice to sell by mortgagee, see note to s. 20 (i.).

Short title of 5 & 6 Will. 4, c. 62.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.

The object of this s. is to render unnecessary the long and cumbrous title of the Act referred to. The Form given in the schedule to that Act will now run thus: I, A. B., do solemnly . . . and by virtue of the provisions of the Statutory Declarations Act, 1835.

See also the Short Titles Act, 1892, schedule 1.

COURT; PROCEDURE; ORDERS.

XVI.—COURT; PROCEDURE; ORDERS.

Regulations respecting payments into Court and applications.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

As to the bearing of this subs. on applications for relief under s. 14 (2), by lessee in a lessor's action brought in the Q. B. D., see *Cholmley's School v. Sewell*, 1893, 2 Q. B. 254.

The county courts have no jurisdiction: *Lock v. Pearce*, 1893, 2 Ch. 271, 275, 278-9.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

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It has been held that this subs. is obligatory: *Re Lillwall's Trusts*, 30 W. R., 243, W. N., 1882, 6; *Latham v. Latham*, W. N., 1889, 171.

But it does not extend to the case of the action which, under s. 14 (2), a lessee may bring for relief against forfeiture; this must be instituted by writ, not by originating summons: see *Lock v. Pearce*, 1893, 2 Ch. 271. And as to the lessee's mode of proceeding, under s. 14 (2), in the lessor's action, see *Cholmeley's School v. Sewell*, *ubi sup.*; and see R. S. C., 1883, O. 70, r. 1, and *Re Martin & Varlow*, W. N., 1894, 223.

S. 69.
—
COURT; PRO-
CEDURE;
ORDERS.
—
Relief against
forfeiture.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

Compare S. L. A., s. 46 (6), and *Re Smith's S. E.*, 1891, 3 Ch. 65, pp. 72-6.

"Costs,
charges, or
expenses."

(8.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

39 & 40 Vict.
c. 59, s. 17.

See also Supreme Court of Judicature Act, 1881, s. 19; Supreme Court of Judicature (Procedure) Act, 1894, s. 4.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

As to exercise of the powers of the Court, in respect of land in Durham, by the Palatine Court there, see Palatine Court of Durham Act, 1889, s. 10.

Durham
Palatine Court,
and Lancaster
Court Rules.

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SS. 69, 70.

COURT; PRO-
CEDURE;
ORDERS.

As to power to make rules for the Court of Chancery of Lancaster, see Chancery of Lancaster Act, 1890, s. 6.

And as to rules for inferior courts generally, see now Supreme Court of Judicature Act, 1884, s. 24.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Orders of
Court con-
clusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

Applies to
orders of the
old Courts.

“Court” is defined, s. 2 (xviii.), as “Her Majesty’s High Court of Justice,” which is a division of the Supreme Court which includes the old Courts of Chancery and Common Law (Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 3, 4), all united into one Court, so that this s. applies to all orders of the old Courts.

And query if, under this s., there is a “power” or “authority” of the High Court, exercisable, in certain matters, by a County Court, under s. 67 of the County Courts Acts, 1888: and see *Bowling v. Wilby*, 39 Sol. Jour. 134. 1875 1. 22. 663.

40 & 41 Vict.
c. 18, s. 40.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

What matters
covered by
this s.

This s. has an important effect in making valid titles under sales by the Court. The order for sale is made conclusive in favour of a purchaser as to jurisdiction (for instance, to sell part of a settled estate

CONVEYANCING AND LAW OF PROPERTY ACT, 1881. 127

for any purpose) and as to consent (as of a respondent in a petition under the Settled Estates Act), notice or service (as where a party to an action or a person served with notice of judgment in an action does not appear). It is also conclusive in favour of a purchaser as to dispensing with the concurrence or consent of persons entitled, whether the objection to the order appears on the face of it or not: *Hall-Dare's Contract*, 21 Ch. D. 41. This case appears to decide that every order of the right Court is valid in favour of a purchaser, *ib.* 47: see also *Mostyn v. Mostyn*, 1893, 3 Ch. 376. "Purchaser" in this Act includes a lessee or mortgagee: s. 2 (viii.).

SS. 70, 71.
—
COURT; PRO-
CEDURE;
ORDERS.
—

Subs. 2 & 3 give this s. an important retrospective effect by making valid every past lease or sale under the Settled Estates Acts of 1856 and 1877, where no proceedings have been taken to question the sale, notwithstanding that there has been in fact an omission to obtain the required consent under s. 28 of the first Act, or s. 40 of the second Act.

How far retro-
spective.

XVII.—REPEALS.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

REPEALS.
—
Repeal of
enactments
in Part III.
of Second
Schedule;
restriction on
all repeals.

Subs. 2 preserves to the full extent the power of sale given by Lord Cranworth's Act in cases of mortgages prior to 1882. The "operation or effect" of the mortgage was under that Act to give every mortgagee a power of sale unless otherwise agreed, and as a "consequence" he could sell. This "operation, effect, or consequence" is not to be affected by the repeal of the Act (see *Solomon & Meagher's Contract*, 40 Ch. D. 508).

Powers under
Lord Cran-
worth's Act
preserved.

As to the effect of the repeals in this s., see *Quilter v. Mapleson*, 9 Q. B. D. 675, 677; *Re Dickson, Hill v. Grant*, 29 Ch. D. 331, 333, 340.

SS. 72, 73.

IRELAND.

Modifications
respecting
Ireland.

XVIII.—IRELAND.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

40 & 41 Vict.
c. 57, s. 69.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Death of bare
trustee in-
testate, &c.
37 & 38 Vict.
c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE.

ACTS AFFECTED (a).

PART I.

- 1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.
- 2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, *lis pendens*, and fiats in bankruptcy.
- 18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of *lis pendens*, and life annuities or rent-charges.
- 22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.
- 23 & 24 Vict. c. 38.—An Act to further amend the law of property.
- 23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.
- 27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.
- 28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.
- 31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

(a) The Acts in Part I. of this schedule were affected only by ss. of the Bill struck out in the House of Commons, and the reference to them here should also have been struck out (see Preface to the first edition). But those ss. are now included in s. 2 of the C. A., 1882; and the latter section refers (see subs. 1) to Part I. of this schedule; see also s. 17 of the Land Charges Registration & Searches Act, 1888, *infra*, Part II. ch. i.

PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of Parliament, intituled “An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;” and to make other provisions for the abolition of unnecessary oaths.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35, in part.	An Act to further amend the law of property and to relieve trustees Sections four to nine.	} in part; namely,—
23 & 24 Vict. c. 126, in part.	The Common Law Procedure Act, 1860 Section two.	} in part; namely,—

PART II.

15 & 16 Vict. c. 86, in part.	An Act to amend the practice and course of proceedings in the High Court of Chancery. Section forty-eight.	} in part; namely,—
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CONVEYANCING AND LAW OF PROPERTY ACT, 1881. 131

PART III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property.(a)
23 & 24 Vict. c. 145, in part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills Parts II. and III. (sections eleven to thirty).(b)

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I.

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between A. of [&c.] of the one part and M. of [&c.] of the other part WITNESSETH that in consideration of the sum of £ now paid to A. by M. of which sum A. hereby acknowledges the receipt A. as mortgagor and as beneficial owner hereby conveys to M. All that [&c.] To hold to and to the use of M. in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [four] per centum per annum.

In witness &c.

* * Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.

(a) This is one of the Acts known as Lord Brougham's Acts; the other (8 & 9 Vict., c. 124), for shortening leases, is still unrepealed.

(b) Parts I. and IV. of the Act here referred to have since been repealed by the S. L. A., 1882, s. 64, but the powers given by ss. 8 and 9 included in Part I. are now supplied by the T. A., s. 19.

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [§c.] of the one part and *T.* of [§c.] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [§c.] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [§c.] of the first part *B.* of [§c.] of the second part and *C.* of [§c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [§c.] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [§c.] of the first part *B.* of [§c.] of the second part and *C.* of [§c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [§c.] WHEREAS the principal sum of £ only remains due in respect of

the said mortgage as the mortgage money and no interest is now due and payable thereon. AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [§c.] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [four] per centum per annum.

In witness &c.

[Or, in case of further advance, after aforesaid at* (*insert*) and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, and after of at † (*insert*) the sums of £ and £ making together]

* * * Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [§c.] of the one part and *B.* of [§c.] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [§c.] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

* * * Variations as noted above.

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between A. of [§c.] of the one part and B. of [§c.] and C. of [§c.] of the other part WITNESSETH that in consideration of the sum of £ paid to A. by B. and C. out of money belonging to them on a joint account of which sum A. hereby acknowledges the receipt A. hereby covenants with B. and C. to pay on them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [four] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to B. and C. interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration A. as beneficial owner hereby conveys to B. and C. All that [§c.] To hold to and to the use of B. and C. in fee simple subject to the proviso for redemption following (namely) that if A. or any person claiming under him shall on the day of 1882 pay to B. and C. the sum of £ and interest thereon at the rate aforesaid then B. and C. or the persons claiming under them will at the request and cost of A. or the persons claiming under him re-convey the premises to A. or the person claiming under him AND A. hereby covenants with B.(a) as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of and interest at [four] per centum per annum on property at [§c.] WITNESSETH that in consideration of the further sum of £ paid to A. by B. and C. out of

(a) This should be "B. and C."

money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *O.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and *M.* of [*&c.*] of the third part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *O.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to.

To contain list of documents retained by *A.*]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S.* *John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rent-charge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rent-charge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable, to the use of the same first and other sons successively according to seniority in tail with remainder*] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple. [*Insert trusts of term of 500 years for raising portions ; also, if required, power to charge jointure and portions on a future marriage ; also powers of sale, exchange, and partition (a), and other powers and provisions, if and as desired.*]

In witness &c.

(a) Powers of sale, exchange, partition, enfranchisement, and leasing are now supplied by the S. L. A.'s, 1882 to 1890, and should be omitted.

CHAPTER IV.

THE CONVEYANCING ACT, 1882.

45 & 46 VICT. c. 39.

*An Act for further improving the Practice of Conveyancing ;
and for other Purposes.* [10 August, 1882.]

BE it enacted by the Queen's most Excellent Majesty,
by and with the advice and consent of the Lords Spiritual
and Temporal, and Commons, in this present Parliament
assembled, and by the authority of the same, as follows :

S. 1.

Preliminary.

Preliminary.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881), and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

Short titles ;
commence-
ment ; extent ;
interpretation.
44 & 45 Vict.
c. 41.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

Ss. 3-6, and s. 7, suba. 3, and s. 11 are retrospective, except in case of s. 3 as to pending actions.

What ss. retro-
spective.

- (3.) This Act does not extend to Scotland.
- (4.) In this Act and in the Schedule thereto—
 - (i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not ;
 - (ii.) Purchaser includes a lessee or mortgagee, or an

SS. 1, 2.

*Preliminary.*3 & 4 Will. 4,
c. 74.4 & 5 Will. 4,
c. 92.

intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

Searches.

Official negative and other certificates of searches for judgments, Crown debts, &c.

Search not usual for enrolled deeds.

Searches in Land Registry.

Searches.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

In respect to deeds this s. applies to those of which *entries* only are made, as, for instance, a deed creating a rent-charge; it does not apply to deeds *enrolled* under any Act or statutory rule (see subs. 11 and note). A search would not usually be made for deeds so enrolled. But search for disentailing deeds may in some cases be necessary: see Part II. ch. iii. for searches generally.

For rules relating to the Central Office, see R. S. C., 1883, O. lxi.; and as to searches, *ib.*, r. 23.

The provisions of this s. are extended to searches in the registers at the Land Registry under the Land Charges Registration and Searches Act, 1888: see s. 17 of that Act, *infra*, Part II. ch. i.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office

a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

S. 2.
 —
Searches.
 —

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

† See definition of purchaser, s. 1 (4), (ii.).

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict.
 c. 59.

44 & 45 Vict.
 c. 68.

See the rules under this s., Chapter V., *infra*.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any Rule made

SS. 2, 3.

Searches.

thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

3 & 4 Will. 4,
c. 74.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule.

See now R. S. C., 1883, O. lxi. r. 23.

(12.) This section does not extend to Ireland.

Notice.Restriction on
constructive
notice.*Notice.*

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Subs. (ii.) prevents constructive notice under such circumstances as those in *Hargreaves v. Rothwell*, 1 Keen. 160, or *Re Cousins*, 31 Ch. D. 671; and see *Re A. W. Hall & Co.*, 37 Ch. D. 712; *Re Halifax Sugar Refining Co.*, W. N., 1891, 2, 29; *Re New Chile Gold Co.*, W. N., 1892, 193; *English & Scottish Mercantile Investment Co. v. Brunton*, 1892, 2 Q. B. 1, 700; *Bailey v. Barnes*, 1894, 1 Ch. 25. And as to the effect of notice to one of several persons jointly interested, see *Smith's Case*, 11 Ch. D. 579, 588-9, 599-600; *Re Underbank Mills, &c., Co.*, 31 Ch. D. 226. A purchaser cannot avoid constructive notice by omitting to investigate the title, even though the law under an open contract precludes investigation: *Patman v. Harland*, 17 Ch. D. 353; *Dunning v. E. of Gainsborough*, W. N., 1885, 110; *Re Cox & Neve*, 1891, 2 Ch. 109; *Bailey v. Barnes*, *ubi sup.* Under subs. 2 there will be the same equitable remedy by injunction as before the Act.

S. 3.

Notice.

Notice to one
of several.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

The effect of this subs. seems to be that a purchaser of the fee simple will be bound by provisions in any deed forming part of the title unless he escapes as a purchaser without notice. The cases in the last note show that he will not so escape if he knows, or ought to know, of the deed, though he may not know its contents; and see *English & Scottish Mercantile Investment Co. v. Brunton*, 1892, 2 Q. B. 700, which suggests (pp. 708, 713-14) a distinction between the purchase of land and that of personal property, and also takes a distinction between documents which must and those which may or may not relate to the subject-matter and decides that mere knowledge of the existence of the latter does not necessarily amount to constructive notice of their contents. If the title is furnished on an open contract, and commences with a deed of the proper kind forty years old, having no recitals, he is bound, under the V. & P. A., s. 1, to accept this, and takes, it is conceived, without notice of any prior deed. If that deed recites prior deeds, and the recitals throw any suspicion on the title, it would seem that the commencement of the title is not carried back to "the time prescribed by law for commencement of title" (see C. A., s. 3 (3), and the second note thereon, *supra*), and that the purchaser is not prevented by either of the last-mentioned ss. from requiring the earlier title, and is fixed with notice of it if he does not inquire, or, on inquiry, does not get satisfactory explanation.

Purchaser
must inquire.

SS. 3, 4.

Notice.

Where, by contract between the parties, the time for commencement of title is "stipulated" (see C. A., s. 3 (3)), but if left as "prescribed by law," would have extended over a stage in the title disclosing some defect, there the purchaser must take the consequences of contracting himself out of the right to travel through that stage.

As regards s. 3, subs. 1 and 2, of the C. A., the title would not be in the possession of the vendor, and it is open to the purchaser to apply for it at his own expense. If he does not, this subs. prevents his gaining any assistance from this s. If he does all he can to obtain production and fails, it is conceived he is, under this s., free from constructive notice of what is not disclosed. So also a lessee gains no benefit by this s. if he does not inquire into his landlord's title. Also a sub-lessee will, under this subs., take subject to all the provisions of the superior lease, even though his lessor should show a title and profess to lease as freeholder. The leasehold interest is bound legally and not merely equitably, and purchase for value without notice is no defence.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

Leases.

Contract for
lease not part
of title to lease.

Leases.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

Effect of s. 4.

The effect of this s. is merely to prevent a purchaser of the lease after it is granted, requiring as part of his title an abstract and production of the contract under which it was granted; thus placing the contract in the same position as a document showing the freeholder's title under V. & P. A., s. 2.

Separate Trustees.

SS. 5, 6.

*Separate Trustees.**Appointment of separate sets of trustees.*

5.—(1.) *On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be appointed for the first-mentioned part.*

(2.) *This section applies to trusts created either before or after the commencement of this Act.*

This s. was amended by s. 6 of C. A., 1892; and, with the amending s., repealed by the T. A., s. 10 of that Act taking their place.

See, on this s., *Re Paine's Trusts*, 28 Ch. D. 725; *Re Gregson's Trusts*, 34 *ib.* 209; *Re Hetherington's Trusts*, *ib.* 211; *Savile v. Couper*, 36 *ib.* 520; *Re Moss's Trusts*, 37 *ib.* 513; and note that, where orders were made, they were under the Trustee Acts: see also *Re Nesbitt's Trusts*, 19 L. R. Ir. 509.

*Powers.**Powers.**Disclaimer of power by trustees.*

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such a disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

It will be observed that the marginal note applies to disclaimer by trustees only; but the words of the s. are unlimited, and the marginal note cannot limit them: see *A. G. v. Great Eastern Railway Co.*, 11 Ch. D. 449, at pp. 460–1, 465.

"By trustees."

C. A., s. 52, enables the release of a power whether coupled with an interest or not (unless it is coupled with a duty), thereby extinguishing it, so that several trustees concurring can absolutely preclude themselves from ever exercising the power, but it does not enable one trustee alone to disclaim as he could disclaim a trust estate, so as to vest the power in the other trustees. This s. puts disclaimer of a

Disclaimer of powers.

SS. 6, 7.

*Powers.*Married
women.S. L. A.
powers.

power on the same footing as disclaimer of an estate: see Sugd. Powers, 50, 8th ed.; *Re Fisher & Haslett*, 13 L. R. Ir. 546.

On the question whether this s. enables a married woman to disclaim a power, compare the note to C. A., s. 52.

It would seem this s. applies to the case of the joint power given to husband and wife in an ordinary marriage settlement, where the husband disclaims, unless it is a power coupled with a duty (see note to s. 52 of the C. A., 1881), or unless it were held that they, as parties to the settlement, have accepted the power and so cannot disclaim.

As to disclaimer of powers under the S. L. A.'s, 1882 to 1890, see S. L. A., 1882, s. 50, n.

*Married
Women.*Acknowledg-
ment of deeds
by married
women.*Married Women.*

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and in section seventy-four of the Fines and Recoveries (Ireland) Act, there shall by virtue of this Act be substituted for the word "persons" the word "person," and for the word "commissioners" the word "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

"Other enactments," e.g. Malins' Act, 20 & 21 Vict. c. 57.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

S. 84 of the English Fines and Recoveries Act as it now stands, consequent on this repeal, will be found after the schedule to this Act. The new form of memorandum is given in R. S. C. of December, 1882, in the next chapter.

The effect of this s. (including the repeal therein) is :

1. To substitute one perpetual or special commissioner in place of two.

2. To make a memorandum of acknowledgment indorsed on the deed sufficient, without any separate certificate to be filed.

But under the M. W. P. A. every woman married after 1882, and every other married woman, as to property acquired after that year, is in the position of a *feme sole*, and can convey without any acknowledgment: see *Re Drummond & Davie*, 1891, 1 Ch. 524.

See the effect of a married woman's acknowledgment and separate examination discussed in *Tennant v. Welch*, 37 Ch. D. 622, and in *Cahill v. Cahill*, 8 App. Cas. 420, 428, 441.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

See, for rules under this subs., the next chapter.

(4.) The enactments described in the schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds

S. 7.

Married
Women.

Effect of s. 7,
and of
M. W. P. A.

39 & 40 Vict.
c. 59.

44 & 45 Vict.
c. 68.

40 & 41 Vict.
c. 57.

s. 7.

Married
Women.

by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner, and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

See form of requisition for an official search for certificates of acknowledgments, R. S. C. of December, 1882, in the next chapter.

Subs. 3 applies to deeds *acknowledged* before or after the end of 1882, and subs. 5 applies to the *execution* of deeds after 1882. So far as regards the interest of the person since the Act, or of either of the persons before the Act, taking an acknowledgment, the deed is unimpeachable, whether executed before or after 1882. But so far as regards the manner of acknowledgment, the Act applies only to deeds executed after 1882.

Certificates lodged after the commencement of the Act and referred to in subs. 6, necessarily mean the certificates of acknowledgments taken but not lodged before the Act: see the repealed ss. of the Fines and Recoveries Acts in the schedule. An index of certificates of acknowledgment has still to be kept, to enable searches in regard to deeds executed before the Act.

Powers of Attorney.

S. 8.

*Powers of
Attorney.*

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

Effect of power of attorney, for value, made absolutely irrevocable.

- (i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and
- (ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
- (iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

This s. relates only to powers of attorney given for value, and enables a power of that kind to take the place of an actual transfer, but it is conceived that the attorney must be a person named, and that the power lapses by his death. He may, however, be empowered to appoint substitutes. A person desiring to give a security may, in consideration of the loan, give an irrevocable power to transfer, or convey, or sell, thus enabling the lender to realize his security, if he so require. When the loan is repaid the power may be cancelled, and a transfer and re-transfer are thus avoided. The person taking the power must use all the same precautions as if he had taken an actual transfer, so as to prevent

Powers of attorney given for value.

SS. 8, 9.

*Powers of
Attorney.*Winding-up of
Company.

another transferee taking without notice. In the case of land, for instance, he must obtain the deeds.

It is conceived that "bankruptcy" does not include proceedings for winding-up a Company (see note on C. A., s. 2 (xv.)); and that notice of winding up proceedings is of itself revocation of a power of attorney given by a Company—at all events where the winding-up is by the Court, or under its supervision, and where it is proposed to make any disposition, under the power, of the Company's property: see s. 153 of the Companies Act, 1862, and *Re Oriental Bank*, 28 Ch. D. 634, 640. The result may be different in a voluntary winding-up (see ss. 131, 133, and *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 387); moreover, a voluntary winding-up, for which a resolution of the Company seems necessary (see ss. 129, 130), might be held to fall within the words, "anything done by the donor of the power without the concurrence of the donee of the power."

Trustees.

It may be questioned whether a trustee, who, in special cases, may act by attorney (see *Re Bellamy & Metropolitan Board of Works*, 24 Ch. D. 387, 400, 403-4; *Re Helling & Merton*, 1893, 3 Ch. 269, 280), is entitled to give an irrevocable power under this or the following s. The power is fairly workable under C. A., s. 47; and to make it irrevocable paralyzes the trustee's discretion.

Effect of power
of attorney,
for value or
not, made
irrevocable for
fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser—

- (i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and
- (ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
- (iii.) Neither the donee of the power, nor the purchaser

shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

SS. 9, 10.

*Powers of
Attorney.*

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

This s. includes powers of attorney not given for value, as, for instance, where a person going abroad desires to give a power to sell property. The main difficulty hitherto has been that in order to make a complete title it was necessary to ascertain that the principal was living when the transfer under the power was made. In order to avoid this, the only course was to make an actual transfer on trust for sale. If no sale was made, a re-transfer became necessary, thus in the case of land putting two deeds in the title. This s. and s. 8 are supplementary to C. A., ss. 46, 47.

Power of
attorney not
given for
value.

Though not necessary since the C. A., s. 46, it is usual and proper that the attorney should sign the principal's name and express the deed to be signed, sealed, and delivered by the attorney, naming him. The principal is named and described amongst the parties as if he himself executed, and no other reference is made to the attorney or the power, except in the signature and attestation clause (see as to execution by an attorney, *Coombes's Case*, 9 Co. Rep. 77; *Frontin v. Small*, 2 Lord Raym. 1418; *Wilks v. Back*, 2 East, 142; see also *Laurie v. Lees*, 14 Ch. D. 249, 7 App. Cas. 19, where, though the attorneys executed in their own names, the inference was that they did so on behalf of their principal: 7 App. Cas. 28, per Lord Penzance).

Execution by
attorney.

Executory Limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

*Executory
Limitations.*

Restriction on
executory
limitations.

SS. 10, 11, 12.

*Executory
Limitations.*

Executory
limitations
assimilated to
strict settle-
ment.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

An executory limitation generally prevented alienation for a longer period than an ordinary strict settlement. Thus under a devise "to A. in fee simple, and if he die without issue living at his death to B. in fee simple," with further limitations over of the same kind, it was necessary that all the persons named should concur in a sale, whereas in case of an ordinary strict settlement on the several persons named and their issue, A. with his son, when of age, can bar the entail and sell. This s. enables A. alone to sell when any child or other issue of his attains twenty-one, the limitations over becoming barred in the same event in which the entail under a strict settlement could be barred. The s. gives no estate to the issue, but simply gives A. in his lifetime, when a child or other issue of his attains twenty-one, the same complete power of disposition as independently of the Act he would acquire at his death if a child or other issue of his were then living.

The s. only applies to an estate in fee or for life, or a term of years absolute or determinable with life.

Long Terms.

Amendment of
enactment
respecting long
terms.

Long Terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

- (i.) Any term liable to be determined by re-entry for condition broken; or
- (ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

See notes on C. A., s. 65.

Mortgages.

Reconveyance
on mortgage.

Mortgages.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each

incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

SS. 12, 13.

Mortgages.

See notes to C. A., s. 15.

Saving.

13. The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

Saving.

Restriction on
repeals in this
Act.

See notes on C. A., s. 71.

SCHEDULE.

S. 7 (4).

REPEALS.

3 & 4 Will. 4, c. 74,
in part.

The Fines and Re-	}	in part; namely,—
coveries Act		
Section eighty-four, from and including the words “and the same judge,” to the end of that section.		
Sections eighty-five to eighty-eight inclusive.		

4 & 5 Will. 4, c. 92, in part.	The Fines and Re- coveries (Ire- land) Act . . . } in part; namely,— Section seventy-five, from and including the words “and the same judge,” to the end of that section. Sections seventy-six to seventy- nine inclusive.
17 & 18 Vict. c. 75 .	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23 .	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

S. 84 of the English Fines and Recoveries Act as it now stands, consequent on s. 7 (1) of C. A., 1882, and the above repeal, is as follows :

LXXXIV. When a married woman shall acknowledge any such deed as aforesaid, the Judge, Master in Chancery, or Commissioner taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect : *videlicet* [*the form to be now used is given in R. S. C. of December 1882, in the next chapter.*]

CHAPTER V.

RULES OF THE SUPREME COURT UNDER THE FINES AND RECOVERIES ACT AND THE CONVEYANCING ACTS, 1881, 1882 (DECEMBER, 1882).

SECT. I.

*Rules under the Act for the Abolition of Fines and Recoveries,
and Section 7 of the Conveyancing Act, 1882.*

1. No person authorized or appointed under the Act 3 & 4 Will. 4, c. 74 (in these Rules referred to as the Fines and Recoveries Act), to take the acknowledgments of deeds by married women shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a Commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the Commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the Commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the Commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot or at the back thereof.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married

woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act :—

“This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her.”

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment :—

“And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment.”

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment :—

(Signed) A.B.

A Judge of the High Court of Justice in England,

or a Judge of the County Court of

or a perpetual Commissioner for taking acknowledgments of deeds by married women.

or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every Commission appointing a special Commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married

women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. [*Provides for certain costs.*]

9. [*Repeals existing rules and orders, except as to certain certificates not lodged before 1st January, 1883.*]

10. These rules shall take effect from and after the 31st December, 1882.

SECT. II.

Rules under Section 2 of the Conveyancing Act, 1882.(a)

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the

(a) These rules should be read in connection with R. S. C., 1883, Order lxi. Rule 9, which provides that—

All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice, may be enrolled in the Enrolment Department of the Central Office;

And with Rule 23 of the same Order, which provides that—

The Clerk of Enrolments and each of the following Registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate, and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

Rule under the Conveyancing and Law of Property Act, 1881.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the Office. (b).

(b) See C. A., s. 48 (3), and the note thereon.

APPENDIX.

FORM I.

DECLARATIONS BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature,
Central Office.

To the Clerk of Enrolments,
or The Registrar of,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

I declare that the search (*or searches*) in the name (*or names*) of required to be made by the requisition for search, dated the is (*or are*) required for the purposes of a sale (*or mortgage, or lease, or as the case may be*), by *A.B.* to *C.D.*

Signature, }
Address, and }
Description }

Dated

FORM II.

DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or mortgage, or lease, or as the case may be*), by *A.B.* to *C.D.*

FORM III.

REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE (a) UNDER
THE CONVEYANCING ACT, 1882, s. 2.(b)Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Clerk of Enrolments,
Royal Courts of Justice,
London.In the Matter of *A.B.* and *C.D.*Pursuant to section 2 of the Conveyancing Act, 1882,
search for deeds and other documents enrolled during the
period from 18 to 18 , both inclusive, in the
following name (or names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

*(Add declaration, Form II.)**(State if an office copy of the certificate is desired, and whether
it is to be sent by post or called for.)*Signature, address, and }
description of person }
requiring the search }

Dated

(a) Now the Enrolment Department of the Central Office: see R. S. C.,
1883, O. lxi., r. 9.(b) But see that s., subs. 11, and note on "Enrolled Deeds," Part II.
ch. iii.

FORM IV.

REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT
UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Bills of Sale,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882,
search for instruments registered or re-registered as bills of
sale during the period from 18 to 18 , both
inclusive, in the following name (*or names*).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether
it is to be sent by post or called for.)

Signature, address, and }
description of person }
requiring the search }

Dated

FORM V.

REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF
ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER
THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of
Deeds by Married Women,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882,
search for Certificates of Acknowledgments of Deeds by
Married Women during the period from 18 to
18 , both inclusive, according to the particulars mentioned
in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed if the Search relates to a particular Deed.	County, Parish, or place in which the Property is situate, or other description of the Property.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Signature, address, and
description of person
requiring the search

Dated

FORM VI.

REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS
UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules and lis pendens, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 to 18, both inclusive, and for executions for the period from the 29th July, 1864 (*or as the case may require*), to the 18, both inclusive, and for annuities for the period from the 26th April, 1855 (*or as the case may require*), to the 18, both inclusive, in the following name (*or names*).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and
description of person
requiring the search

Dated

[*Note.*—This requisition does not expressly refer to a search for writs of execution on Crown debts, which is the proper search since 1st

November, 1865, under 28 & 29 Vict. c. 104. That search is a general search not limited in time except by the date of commencement of the register. It is made in the same register as the search for executions on ordinary judgments (Dart, V. & P. 495, 5th ed.), and will therefore be included under the general expression "for executions." The day, 29th July, 1864, mentioned in this requisition, is the earliest day from which writs of execution on ordinary judgments are registered in the name of the judgment debtor pursuant to 27 & 28 Vict. c. 112, but no search for those writs is necessary, although the purchaser or mortgagee must see that the vendor or mortgagor is in possession at the time of completion (see Part II., ch. iii., for searches required by this requisition).]

FORM VII.

CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office,
Enrolment Department.

Certificate of Search pursuant to Section 2 of the
Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name [*or names*] of , for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name [*or in any one or more of those names*] during the period aforesaid, *or* and that except the described in the schedule hereto no deed or document has been enrolled in that name [*or in any one or more of those names*] during the period aforesaid.

THE SCHEDULE.

Dated

FORM VIII.

CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF
SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office,
Bills of Sale Department.

Certificate of Search pursuant to Section 2 of the
Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made
in the Register of Bills of Sale in the name [*or names*] of
, for the period from , 18 , to , 18 , both in-
clusive, and that no instrument has been registered or
re-registered as a bill of sale in that name [*or in any one or*
more of those names] during that period, *or*, and that
except the described in the schedule hereto, no instru-
ment has been registered or re-registered as a bill of sale in
that name [*or in any one or more of those names*] during
the period aforesaid.

Dated

THE SCHEDULE.

FORM IX.

CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF
ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER
THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Registry of Certificates of Acknowledgments of Deeds by
Married Women.

Certificate of Search pursuant to Section 2 of the
Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made
in the Office of the Registrar of Certificates of Acknowledg-

ments of Deeds by Married Women in the name [*or names*] of , for the period from , to 18 , both inclusive, for a certificate dated the , *or for certificates of acknowledgment of a deed dated the , or for certificates of acknowledgments of deeds relating to (fill in the description of the property from the Requisition), and that no such certificate has been filed in that name [or in any one or more of those names] during the period aforesaid, or and that except the certificate [or certificates] described in the Schedule hereto, no such certificate has been filed in that name [or in any one or more of those names] during the period aforesaid.*

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of , 188 .

FORM X.

CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER
CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

The Registry of Judgments.

Certificate of Search pursuant to Section 2 of the
Conveyancing Act, 1882.

In the Matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, *lis pendens*, judgments

at the suit of the Crown, Statutes, recognizances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 , to 18 , both inclusive, and for executions for the period from 18 , to 18 , both inclusive, and for annuities for the period from , to , 18 , both inclusive, in the name [*or names*] of , and that no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or in any one or more of those names*] during the respective periods covered by the aforesaid searches, *or* and that except the mentioned in the Schedule hereto, no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or in any one or more of those names*] during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of , 188 .

FORM XI.

REQUISITION FOR CONTINUATION OF SEARCH UNDER THE
CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office.

Requisition for Continuation of Search.

To the Clerk of Enrolments,
or The Registrar of
Royal Courts of Justice,
London, W.C.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [], made pursuant to the requisition dated the day of 18 , in the name [*or*

names] of , from the day of to the day of
18 , both inclusive.

Signature, address, and }
description of person }
requiring the search }

Dated .

FORM XII.

CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE
CONVEYANCING ACT, 1882, s. 2, TO BE ENDORSED ON
ORIGINAL CERTIFICATE.

This is to certify that the search [*or searches*] mentioned
in the within-written certificate has [*or have*] been diligently
continued to the day of , 18 , and that up to and
including that date [*except the* mentioned in the
schedule hereto (*these words to be omitted where nothing is
found*)], no deed or other document has been enrolled, *or* no
instrument has been registered or re-registered as a bill of
sale, *or* no certificate has been filed, *or* no judgment, revival,
decree, order, rule, *lis pendens*, judgment at the suit of the
Crown, statute, recognizance, Crown bond, inquisition,
acceptance of office, execution, or annuity, has been registered
or re-registered in the within-mentioned name [*or in any
one or more of the within-mentioned names*].

Dated .

CHAPTER VI.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

55 & 56 VICT. c. 13.

An Act to amend the Conveyancing and Law of Property Act, 1881. [20th June, 1892.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows :

SS. 1, 2.

Preliminary.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act shall be read together and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

Short title and extent.
44 & 45 Vict.
c. 41.
45 & 46 Vict.
c. 39.

(2.) This Act does not extend to Scotland.

Leases, Under-leases, Forfeiture.

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act.

Costs of waiver, and forfeiture in case of bankruptcy or execution.

168 CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

S. 2.

Costs in
reference to
breach.

In *Skinnners' Co. v. Knight*, 1891, 2 Q. B. 542, the Court of Appeal held a lessee not liable to pay to his lessors (plaintiffs in an action for ejectment), as compensation for breach of a covenant in the lease, the lessors' costs of employing a solicitor and surveyor in the preparation and service of the notice required by C. A., s. 14 (1). This amending subs. gives a lessor, in the cases where it applies, a right of action for such costs.

It is conceived that, independently of the amending subs., the Court has power, where the lessee is applying for relief (in *Skinnners' Co. v. Knight* he was not), to make the payment, by the lessee, of such costs, a term of the relief, under C. A., s. 14 (2); or to order their payment, by the lessee, as "charges or expenses" under C. A., s. 69 (7): compare *Re Smith's S. E.*, 1891, 3 Ch. 65, pp. 73-5, a decision on S. L. A., s. 46 (6).

"Lessee."

Notwithstanding C. A., s. 14 (3), "lessee" does not include an underlessee except as against his own underlessor; that subs. is to be construed only so as to make the provisions of C. A., s. 14—as amended by C. A., 1892—applicable as between a derivative lessor and his lessee, as well as between the head lessor and his lessee: see *Nind v. Nineteenth Century Building Society*, 1894, 2 Q. B. 226.

"Relieved."

The lessee is not "relieved" unless there is some intervention of the Court under C. A., s. 14 (2): see S. C.

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto.

(3.) Sub-section two of this section is not to apply to any lease of—

- (a) Agricultural or pastoral land:
- (b) Mines or minerals:
- (c) A house used or intended to be used as a public-house or beershop:
- (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures:
- (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of

the property, or on the ground of neighbourhood to the lessor, or to any person holding under him. SS. 2, 3, 4.

It seems that a condition for forfeiture on bankruptcy is not enforceable against an assignee where the assignor has become bankrupt after the assignment: *Smith v. Gronow*, 1891, 2 Q. B. 394. Bankruptcy of lessee who has assigned.

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent. No fine to be exacted for licence to assign.

This s. does not affect the principle of the decision in *Barrow v. Isaacs*, 1891, 1 Q. B. 417, that the Court can give no relief against forfeiture, where there has been an assignment without licence or consent. Forfeiture for assigning without leave.

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require Power of Court to protect under-lessees on forfeiture of superior leases.

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SS. 4, 5.	a lease to be granted to him for any longer term than he had under his original sub-lease.
"Is proceeding."	The under-lessee must apply for relief before the lessor has re-entered: see <i>Rogers v. Rice</i>, 1892, 2 Ch. 170. It may happen that proceedings are carried through to execution before the under-lessee—who may be a mere mortgagee, not in possession—hears of them; and query, if in such a case, the Court would set aside the execution, and give the under-lessee leave to defend: see the last cited case.
Application by under-lessee.	The under-lessee's application may be by way of counterclaim in the lessor's action, though brought in the Q. B. D.: see <i>Cholmeley's School v. Sewell</i> , 1893, 2 Q. B. 254.
Relief.	Wider relief may be given under this s. to an under-lessee than the lessee could ask. In the last cited case the lessor relied on a forfeiture by the lessee's bankruptcy. The property was a public house, so that the lessee could not have got relief under subs. 2 of this Act, by reason of subs. 3 (c); but it was held in the same case (1894, 2 Q. B. 906) that this s. nevertheless authorized relief to the under-lessee.
Terms of vesting order.	The powers of the Court, under this s., in relation to the terms of the vesting order, seem far wider than those under similar provisions in the Bankruptcy Acts, 1883 and 1890 (see s. 55 of the former Act, and s. 13 of the latter; and <i>Re Finley</i> , 21 Q. B. D. 475; <i>Re Smith</i> , 25 <i>ib.</i> 536); and see as to the extent, and the mode of exercise, of those powers, <i>Cholmeley's School v. Sewell</i> , 1894, 2 Q. B. 906.
Interest given by vesting order.	It is conceived that where, as in the last cited case, judgment is given for the lessor, coupled with an order vesting the property in the under-lessee for the length of his sub-term, his original sub-term is gone by the forfeiture (see <i>Great Western Railway Co. v. Smith</i>, 2 Ch. D., 235, at p. 253); and that a new term is created by the vesting order, in respect of which the under-lessee must give the lessor proper covenants, and a proper condition of re-entry: compare the forms of Deeds of Defeazance, given by lessees for reviving conditions of re-entry lost under the rule in <i>Dunpor's Ca.</i>, in Davidson's Conveyancing, 2nd ed., vol. v. pt. ii. p. 1032; Bythewood and Jarman, 3rd ed., vol. iii. pp. 685, 687-95.
Extension of definitions of "lease," "under-lease," and "under-lessee."	5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted, and in this Act "under-lessee" shall include any person deriving title under or from an under-lessee.

CONVEYANCING AND LAW OF PROPERTY ACT, 1892. 171

This s., in giving the extended meaning to the words "lease," SS. 5, 6.
"under-lease," carries out the view of the law set out in *Swain v.*
Ayres; *Lowther v. Heaver*; and *Strong v. Stringer*, cited in the note "Lease,"
on C. A., s. 14 (1). "under-lease."

Trustees.

6. *A separate set of trustees or a separate trustee may be appointed under the fifth section of the Conveyancing Act, 1882, of a part only of the trust property, notwithstanding that no new trustees or trustee are to be appointed of other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; and every appointment already made of a separate set of trustees shall be valid, notwithstanding that there was no retiring trustee of other parts of the trust property, and that no new trustees were appointed of such other parts thereof.* *Trustee may be appointed for separate parts of property though no new trustee be appointed of other parts.*

This s. is repealed by the T. A., and s. 10 of that Act takes its place.

PART II.

CHAPTER I.

THE LAND CHARGES REGISTRATION AND SEARCHES
ACT, 1888.

51 & 52 VICT. c. 51.

*An Act for registering certain Charges on Land, and for
facilitating Searches for them. [24th December, 1888.]*

SS. 1, 2, 3, 4. BE it enacted by the Queen's most Excellent Majesty,
by and with the advice and consent of the Lords Spiritual
and Temporal, and Commons, in this present Parliament
assembled, and by the authority of the same, as follows :

INTRODUC-
TORY.

PART I.—INTRODUCTORY.

Short title.

1. This Act may be cited as the Land Charges Regis-
tration and Searches Act, 1888.

Commence-
ment.

2. This Act shall come into operation on the first day
of January, one thousand eight hundred and eighty-nine,
which day is in this Act referred to as the commence-
ment of this Act: Provided that any rules under this
Act may be made, and any other thing for the purpose
of bringing this Act into operation may be done, at any
time after the passing thereof, but any such rules or
thing shall not take effect until the commencement of
this Act.

Extent.

3. This Act shall not extend to Scotland or Ireland.

Interpretation.

4. In this Act :

“Land” includes lands, messuages, tenements, and
hereditaments corporeal and incorporeal of any
tenure.

“Purchaser for value” includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and “purchase” has a meaning corresponding with purchaser.

“Person” includes a body of persons corporate or unincorporate.

“Prescribed” means prescribed by any general rules made in pursuance of this Act.

“Act of Parliament” includes local and personal Act.

“Land charge” means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

24 & 25 Vict.
c. 133.
46 & 47 Vict.
c. 61.

“Land charge” also includes charges under s. 31 of the Agricultural Holdings (England) Act: see Tenants Compensation Act, 1890, s. 3.

But not charges created “in invitum,” e.g. under s. 257 of the Public Health Act, 1875: see s. 10, *infra*, and *Reg. v. Land Registry*, 24 Q. B. D. 178.

“Deed of arrangement” has the same meaning as in the Deeds of Arrangement Act, 1887.

50 & 51 Vict.
c. 57.

“Judgment” does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

S. 5.

REGISTRATION
OF WRITS
AND ORDERS
AFFECTING
LAND.

Writs and
orders.

PART II.—REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

The Bankruptcy Court still evades the duty of keeping a proper record of bankruptcies and receiving orders so as to facilitate a search, which at present is the most onerous of all searches, and cannot be made with any certainty as to a correct result.

Writs or orders not in bankruptcy require to be re-registered under this Act every five years: s. 5 (3).

The Crown not being mentioned, its process of execution is not affected by the Act: see *Ex parte Postmaster-General*, 10 Ch. D. 595.

Registration under this Act supersedes registration in the Supreme Court: s. 5 (4).

The search will be in the names of the vendor or mortgagor and their predecessors in title, dead or living: see Form of Elegit. R. S. C., 1883, App. H. Form 3; R. S. C. 1883, O. 42, R. 23; *Re Shephard*, 43 Ch. D. 131; s. 5 (2), *infra*.

Search for *lis pendens* must still be made to the same extent as if this Act had not passed: s. 6 (b).

Register of
writs and
orders affect-
ing land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

“Any Court,” “any order”: these words seem to cover an order of a County Court appointing a receiver under s. 2 (3) of the Tithe Act, 1891; but query as to an order under s. 2 (2): see definition of “Judgment” in s. 4, *supra*.

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3.) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make

unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

SS. 5, 6.

REGISTRATION
OF WRITS
AND ORDERS
AFFECTING
LAND.

Power to vacate the registration of a writ or order affecting land (formerly wanting: see *Cook v. Cook*, 15 P. D. 116) has been given by S. L. A. 1890, s. 19, *infra*, Part V., ch. vi.

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

Protection of
purchasers
against non-
registered
writs and
orders.

"Unless . . . for the time being": the words in ss. 9 and 12, *infra*, are "unless and until."

There is no provision for re-registration of Deeds of Arrangement or of Land Charges.

Provided that—

- (a) Where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled "An Act to amend the law relating to future judgments, statutes, and recognizances," nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

"The period" must be the three months for which registration holds good under s. 1 of 23 & 24 Vict. c. 38, the provisions of which Act are, by 27 & 28 Vict. c. 112, s. 3 (and see s. 4) to be followed in registering under the latter Act. It follows, that since 31st March, 1889, searches in the Central Office for executions, otherwise than on Crown debts, have become unnecessary.

- (b) Where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

SS. 7, 8, 9.

PART III.—REGISTRATION OF DEEDS OF ARRANGEMENT.REGISTRATION
OF DEEDS OF
ARRANGE-
MENT.

All deeds of arrangement, whether executed before or after the commencement of the Act, must be registered (s. 9), but one year was allowed for registration of deeds executed before 1889 (s. 9).

Deeds of
arrangement.

The search will be in the names of the vendor or mortgagor, and their predecessors in title.

Register of
deeds of
arrangement
affecting land.

7. A register (in this Act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor.

Registration
of deeds of
arrangement.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Protection of
purchasers
against un-
registered
deeds of
arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this Act, shall be void as against a person who, after the commencement of this Act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this Act until the expiration of one year from the commencement of this Act if registered within that year.

REGISTRATION
OF LAND
CHARGES.**PART IV.—REGISTRATION OF LAND CHARGES.**Land charges
after 1888.

Only land charges created after 1888 are absolutely required to be registered under this Act.

Before 1889.

As to land charges before 1889 the same searches must be made as formerly. The provision in s. 13 for registration on an assignment made after 1888, gives assistance, but cannot be relied on, as there may be no such assignment.

Against whom.

The search (s. 10) must be in the name of the person entitled whether legally or equitably to the freehold in possession when the charge was created; so that it cannot be confined to the name of the immediate vendor or mortgagor, but must be carried back against all owners in possession for the time being.

10. A register, in this Act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

SS. 10, 11, 12,
13.

REGISTRATION
OF LAND
CHARGES.

Registry of
land charges.

(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge:

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

As to searches by an intending lessee or purchaser of leaseholds for land charges by owners of the leasehold interest, see 33 Solicitors' Jour., 295, 298.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this Act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Expenses.

12. A land charge created after the commencement of this Act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this Act.

Protection of
purchasers
against un-
registered
charges.

13. After the expiration of one year from the first assignment by act *inter vivos*, occurring after the commencement of this Act, of a land charge created before the commencement of this Act, the person entitled thereto shall not be able to recover the same, or any

Non-registered
land-charge
existing at
commence-
ment of this
Act.

SS. 13, 14, 15,
16, 17, 18.

REGISTRATION
OF LAND
CHARGES.

Vacation of
entry.

part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this Act prior to the completion of the purchase.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

SUPPLE-
MENTAL.

Index to
registers.

PART V.—SUPPLEMENTAL.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this Act.

See Rule 3 in ch. ii., *infra*.

Searches.

16. Any person may search in any register or index kept in pursuance of this Act on paying the presented fee.

The word "presented" in this s. obviously should be "prescribed."

Official
searches.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this Act *in the register of lis pendens, the register of deeds of arrangement affecting land, and the register of land charges*, in the same manner as if this Act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881.

45 & 46 Vict.
c. 39.

44 & 45 Vict.
c. 41.

The words in italics seem superfluous.

General rules.

18. The Lord Chancellor may at any time after the passing of this Act, and from time to time, with the concurrence of the Commissioners of Her Majesty's Treasury as to fees, make such general rules as may be required for carrying this Act into effect.

CHAPTER II.

RULES UNDER THE LAND CHARGES REGISTRATION
AND SEARCHES ACT, 1888 (1st JANUARY, 1889).

Rule 1.—The several Registers established by the Act shall contain the following particulars respectively, or such other particulars as the Registrar shall from time to time determine :—

- (1.) The Register of Writs and Orders shall contain :—
 - (a) The name, address, and description of the person whose land is affected.
 - (b) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made.
 - (c) The date of registration, and of any renewal of registration.
 - (d) The name and address of the applicant or of the solicitor (if any) making the application.
- (2.) The Register of Deeds of Arrangement shall contain :—
 - (a) The name, address, and description of the person whose land is affected.
 - (b) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three.
 - (c) The date of registration.
 - (d) The name and address of the applicant or of the solicitor (if any) making the application.
- (3.) The Register of Land Charges shall contain :—
 - (a) The name, address, and description, and capacity (that is to say, whether (i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the Court Rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made.
 - (b) The date of the charge, the statute under which

it is made, and the parish in which the land charged is situated.

(c) The date of registration.

(d) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the Registers themselves, all entries in such registers being made alphabetically in the manner now used in the Register of Judgments in the Central Office of the High Court of Justice, or in such other manner as the Registrar shall from time to time determine.

Rule 4.—Applications for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the Schedule hereto, or in such other forms as the Registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the Office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the Register, such evidence in respect thereof as the Registrar shall from time to time think necessary shall be required.

Rule 8.—These Rules may be cited as the Land Charges Rules, 1889.

THE SCHEDULE.—FORMS.

FORM 1.—*Application to Register a Writ or Order.*

FORM 2.—*Application to Register a Deed of Arrangement.*

FORM 3.—*Application to Register a Land Charge.*

FORM 4.—*Declaration in support of an Application to Register.*

FORM 5.—Application for an Official Search.

[This Form 5 provides for the following searches:—Register of Writs and Orders for the period of five years ending the day of 18, inclusive; Deeds of Arrangement from the day of 18, to the day of 18, inclusive; Land Charges from the day of 18, to the day of 18, inclusive. As to the time over which the last two searches extend, see Chapter III., *infra*.]

FORM 6.—Declaration by separate Instrument as to purposes of Search.**FORM 7.—Certificate of Official Search.****FORM 8.—Requisition for Continuation of Official Search.****FORM 9.—Certificate of Continuation of Official Search (to be endorsed on the original Certificate).**

[The Forms are not set out here, as they are sold at the Office of Land Registry. See Rule 5.]

CHAPTER III.

SEARCHES GENERALLY.

Practical
directions as
to searches.

FOR full information as to searches the reader is referred to Dart, V. & P., Vol. I., p. 521, 6th ed., and Elphinstone and Clark on Searches (including Appendix containing the foregoing Act). But the following short statement as to the most usual searches may be useful in practice.

Judgments,
and writs of
execution on
judgments.

The search for judgments registered under 1 & 2 Vict. c. 110, and requiring to be re-registered every five years under 2 & 3 Vict. c. 11, now only applies to judgments entered up on or before 23rd July, 1860.

Middlesex
registry.

As to searches in the Middlesex Registry for judgments, see the Middlesex Registry Act, 1708, s. 18; Land Registry (Middlesex Deeds) Act, 1891, s. 6.

As to judgments entered up between 23rd July, 1860, and 30th July, 1864, it seems that under 23 & 24 Vict. c. 38, s. 1, they could affect no land, as to a purchaser or mortgagee, without the issue of a writ or other process of execution. Such writ or other process, if issued before 1st January, 1889, required registration under the last-mentioned Act, but the writ or process lost its force, if not executed within three months of its registration (s. 1). If issued since 31st December, 1888, it comes under the Land Charges Registration and Searches Act, 1888, ss. 5, 6, *suprà*, and is void against a purchaser for value, within the meaning of that Act, unless registered thereunder; and, if so registered, it will be discovered on searching, under that Act, at the Land Registry.

Judgments entered up since 29th July, 1864, bind no land until it is actually delivered in execution (27 & 28 Vict. c. 112, s. 1). And writs or orders affecting land, issued or made on such judgments since 31st December, 1888, must be registered at the Land Registry under the Act of 1888. The registration of a writ under the Act of 1864 was effectual for the purposes of a sale under s. 4 thereof, for three months only, so that no writ under the latter Act could remain in force after 31st March, 1889: see s. 6 (a), of the Land Charges Registration and Searches Act, 1888, *suprà*.

If, therefore, the age of the vendor or mortgagor is such that no

judgment could have been obtained against him on or before 23rd July, 1860, a search at the Land Registry under the Act of 1888, is, as to liabilities arising under judgments, sufficient.

The appointment of a receiver is equivalent to an actual delivery in execution, within the meaning of 27 & 28 Vict. c. 112, of the equitable estate in land of a judgment debtor, and would seem to be a "due process of execution" within 23 & 24 Vict. c. 38, s. 1: *Hatton v. Hayward*, L. R. 9 Ch. Ap. 229; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 13 *ib.* 252; *Blackman v. Fysh*, 1892, 3 Ch. 209, 214, 217-8; commenting on *Re Shephard*, 43 Ch. D. 131.

Appointment of receiver.

No registration of writs of execution was required by 27 & 28 Vict. c. 112, except for the purposes of a sale under s. 4 (*Re Pope*, 17 Q. B. D. 743), but now the Land Charges Registration and Searches Act, 1888, makes provision for registration of all writs and orders (other than in bankruptcy) affecting land, and search must be made at the Office of Land Registry.

Registration under 51 & 52 Vict. c. 51.

Crown debts are liable to continue in force against the debtor longer than judgments, the most common obligation to the Crown being the bond given on release of a railway deposit, but the cases must be rare in which a Crown debt before 4th June, 1839, is now subsisting so as to necessitate a search at the Exchequer office. Crown debts after that date are required to be registered (2 & 3 Vict. c. 11, s. 8); and, in order to bind purchasers, mortgagees, or creditors, becoming such after 31st December, 1859, to be re-registered every five years (22 & 23 Vict. c. 35, s. 22). So that for a Crown debt from 4th June, 1839, up to and including 1st November, 1865, a search for five years only is required. As to Crown debts after the latter date, the search must be for writs of execution registered under 28 & 29 Vict. c. 104, ss. 48, 49 (and no other registration is necessary), but there is no three months' limit as there was in case of executions on ordinary judgments under 23 & 24 Vict. c. 38.

Crown debts.

A lis pendens (which does not affect chattels or choses in action: *Wigram v. Buckley*, 1894, 3 Ch. 483) must be re-registered every five years (2 & 3 Vict. c. 11, s. 7), and the search should extend over that period.

Lis pendens.

The search for old enrolled grants of life annuities can now rarely, if ever, be necessary.

Annuities.

The search for entries of grants of life annuities or rent-charges after 26th April, 1855, registered under 18 & 19 Vict. c. 15, s. 12, should be from the commencement of the register on that day if the person against whom search is made had then become entitled to the property and attained twenty-one before that day, but otherwise from the time when he became entitled, whether in possession or in reversion, to the property, or the day when he attained twenty-one, whichever last happened.

Rent-charges.

In case of entailed property a search for enrolled deeds of disentail from the time when the tenant in tail attained twenty-one may be advisable. He may have given a security while his estate was

Disentailing deeds.

reversionary, thereby creating a base fee, and yet the deeds might be in his possession without any default on the part of the creditor.

Bankruptcies.

The search for bankruptcies must still be made by the purchaser's solicitor in the registers at the Bankruptcy Court until means are afforded for an official search. The search should in strictness extend back for twelve years, but a five years' search is commonly deemed sufficient: Dart, 567, 6th ed. The position of a vendor or mortgagor is, however, generally so well known as to render a bankruptcy search unnecessary.

Dealings by bankrupt with subsequently acquired property.

Where the bankrupt has acquired personal property after his bankruptcy, and his trustee has not intervened, transactions by the bankrupt with any person dealing with him bona fide and for value, in respect of such property, whether with or without knowledge of the bankruptcy, are valid against the trustee (*Cohen v. Mitchell*, 25 Q. B. D. 262); but this principle does not apply to real estate: *Re New Land Development Association & Gray*, 1892, 2 Ch. 138; and see further as to the limits of the principle, *Re Clark*, 1894, 2 Q. B. 393.

Insolvencies.

Search for writs, &c., under Act of 1888.

The search for insolvencies can rarely now be necessary.

Searches for writs and orders for five years, and also for deeds of arrangement and land charges, must be made at the office of Land Registry in the registers kept there pursuant to the Land Charges Registration and Searches Act, 1888. The time over which the search for deeds of arrangement and land charges should extend must be determined in the same way as above mentioned with respect to the time for a search in the rent-charge register, except that, as to land charges, search during a minority may be necessary.

Extent of search.

The practice is to make the above searches only since the last preceding sale or mortgage, and not to search against preceding owners, it being assumed that former purchasers made proper searches and found nothing adverse; but the same practice is not generally observed in the case of searches in the Yorkshire, Middlesex, and Irish Deeds Registries: see, however, Elphinstone and Clark on Searches, p. 144.

The searches for judgments, *lis pendens*, and Crown debts may be limited in each case to the period of five years back from the time of search, but they should be made in the names of all persons who were owners since the last purchase or mortgage (see *Benham v. Keane*, 1 J. & H. 685, 708), living or dead (see *Re Shepard*, 43 Ch. D. 131; R. S. C., 1883, O. 42, r. 23), except where it is known that an owner had not attained twenty-one on 23rd July, 1860, as to judgments, or on 1st November, 1865, as to Crown debts.

Writs of execution on Crown debts.

Writs of execution on Crown debts are entered in the same register as those on judgments under 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, and the time of search is not limited except by the commencement of the register (1st November, 1865) under 28 & 29 Vict. c. 104, and no re-registration is required, so that the search for executions must be made generally back to that date or the day when the owner searched against came of age, and the certificate will include executions (if any) on ordinary judgments as well as those on Crown debts: see note to R. S. C., December, 1882, Form VI., p. 161, *suprà*.

Search for Crown debts is not necessary as regards copyholds: Dart, Copyholds. 562, 6th ed.

As to leaseholds, see, as to Crown debts, *Fleetwood's Case*, 8 Co. 340; Leaseholds. as to judgments, that case, and Sugden, Vendors and Purchasers, 14th ed., 520, 521, 524, 536-7; Dart, 6th ed., 525, 531, note (s).

The only search necessary against trustees, or mortgagees, is for *lis pendens* for five years: except that where title is made through a mortgagee selling under a power of sale, there should be a search against him for bankruptcies: see Bankruptcy Act, 1883, s. 44 (ii.). Trustees and mortgagees. It is not necessary to make any search against mortgagees who have been paid off: see 18 & 19 Vict. c. 15, s. 11.

Where the vendor or mortgagor has in his possession certificates of official searches they ought now to be shown on the abstract.

Certificates of searches to be abstracted.

In *Proctor v. Cooper* (2 Drew. 1) a purchaser making a search for judgments was held to have notice of an incumbrance which he failed to discover. The official certificate is now conclusive on all matters within s. 2 of the C. A., 1882, and the solicitor should rely on that, and not search himself: he must, however, see that the requisition delivered under subs. 1 is properly framed.

Certificate conclusive.

Subs. 11 of the last-mentioned s. excludes from the operation of that s. all enrolled deeds, the object being to make the official certificate binding only on those who make use of the office register for recording their incumbrances, and not to affect the validity of any actual conveyance upon which the title to land depends, as in case of a disentailing assurance. But a search for deeds enrolled, though so excluded, can be asked for (see R. S. C., December, 1882, Form III., p. 158), and a certificate of search obtained. It will, however, only extend to deeds enrolled within two years, after which time enrolments of deeds and recognizances are removed to the Record Office (R. S. C., 1883, O. 61, r. 13), and search must be made there by the solicitor himself. It is conceived that a solicitor will be justified in relying on an official certificate for enrolled deeds so obtained, so far as it extends, though this s. does not expressly exonerate him. The Court could scarcely make him answerable for an omission by its own officer.

Enrolled deeds.

Under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54, s. 20), an official return can be obtained to a search. A solicitor, trustee, &c. (s. 23), is held harmless from any error in the return, but the return is not conclusive in favour of the purchaser.

Yorkshire registries.

As to searches in the Middlesex Registry, see Middlesex Registry Act, 1891; Land Registry (Middlesex Deeds) Act, 1891, Sched. i. (11).

Middlesex registry.

If the certificate of search discloses an enrolled deed material to the title, an office copy of the enrolment may be obtained under the 5th of the Rules made under s. 2 of C. A., 1882 (p. 156). An office copy is made evidence of the enrolment by 12 & 13 Vict. c. 109, s. 19. By s. 18 of that Act a certificate of enrolment is authorized to be endorsed on every enrolled deed certifying the day of enrolment, and when sealed and stamped with the seal of the Enrolment Office (see now Supreme Court of Judicature (Officers) Act, 1879, ss. 4, 5, 12 (1);

Office copy and certificate of enrolment.

R. S. C., 1883, O. 61, rr. 6, 7), is evidence that the deed was enrolled on the day mentioned in the certificate.

Deeds Registry
Searches.

Search in a deeds registry should be against each successive owner from the date of the deed under which he acquired his interest to the date of *the registration* of the deed by which he parted with his interest, both dates inclusive. Whether the search should extend over the whole period of the abstract is a question to be considered in each case. Search against a testator or intestate must be continued after his death against him as well as his devisee or heir up to the date of registration of the conveyance by the devisee or heir. Where the will has to be registered within a given time and is not so registered it may be advisable also to search against the heir before taking a title from the devisee. Where a mortgagee sells under his power of sale it is not necessary to search against the mortgagor after the date of registration of the mortgage. As to searches against persons having power to appoint new trustees, see the T. A., s. 12 (4).

Palatine
Courts
Searches.

As to searches in the Palatine Courts of Durham and Lancaster, see Elphinstone and Clark on Searches, pp. 57-9.

PART III.

CHAPTER I.

THE TRUSTEE ACT, 1888.

51 & 52 VICT. c. 59.

*An Act to amend the Law relating to the Duties, Powers,
and Liability of Trustees.* [24th December, 1888.]

The whole of this Act—except ss. 1 and 8—was repealed by the T. A. (see s. 51 and Schedule); and see, for re-enactments similar to the parts of this Act which are repealed, ss. 5 (1) (a), 8, 9, 14, 17, 18, 19, and 45 of the later Act.

Repeal and
re-enactment.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

1.—(1.) This Act may be cited as the Trustee Act, 1888.

Short title,
extent, and
definition.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

As to the distinction between an express and a constructive trustee, see *Soar v. Ashwell*, 1893, 2 Q. B. 390.

Constructive
or express
trustee.

A Director of a Company can, in proceedings taken against him on the footing of breach of trust, claim the benefit of s. 8, as being, within the definition of this subs., "a trustee whose trust arises by construction or implication of law": see *Re Lands Allotment Company*, 1894, 1 Ch. 616.

Director of
Company.

A first mortgagee who has sold is trustee of the surplus proceeds : see *Thorne v. Heard*, 1894, 1 Ch. 599, 607.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

As to the effect of this subs. on the exception in s. 8 (1), see *Moore v. Knight*, 1891, 1 Ch. 547, 553.

Statute of
limitations
may be pleaded
by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him :

(b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order

obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

"A trustee": see s. 1 (3), and note thereon.

"Fraud or fraudulent breach of trust to which the trustee was party or privy": these words indicate moral complicity. A man cannot be a party or privy to that in which he has taken no part and of which he knows nothing, and which has in fact been committed by another for his own benefit; the fraud of the trustee's agent, for his own purposes, is not enough to bring the trustee within this exception: see *Thorne v. Heard*, 1894, 1 Ch. 599.

"Still": i.e. at the date of the issue of the writ. He retains the trust property or the proceeds thereof, if he, or any agent for him, has it so that he can get it; but not if it has been lost, whether by negligence or otherwise: *Thorne v. Heard*, *ubi sup.*

It was held, in *Re Gurney*, 1893, 1 Ch. 590, in an action against trustees for breach of trust in lending trust funds on the security of property of insufficient value, that the application of part of the loan in paying off an existing charge in favour of a banking firm in which one of the trustees was a partner, did not bring him within this exception.

And see, on the necessity of alleging and proving the existence of one of the exceptions, *Re Page*, 1893, 1 Ch. 304.

The application of subs. 1 (a) seems doubtful: see *Re Bowden*, 45 Ch. D. 444, 448, 450-1.

Time runs from the date of the breach of trust, not of its discovery, except in a case of concealed fraud by an agent, for which the trustee is liable as principal (see *Thorne v. Heard*, *ubi sup.*; *Moore v. Knight*, 1891, 1 Ch. 547); and where the breach of trust was an investment on insufficient security, time runs from the date of investment, not from its turning out bad: *Re Somerset*, 1894, 1 Ch. 231.

The period is the six years which may be pleaded under 21 Jac. 1, c. 16; and see *Re Somerset*, *ubi sup.*; *Re Swain*, 1891, 3 Ch. 233, where the time (twelve years) for recovery of the money as a legacy had not expired.

If a trustee is liable on other grounds than mere trusteeship, e.g. fraud by an agent, for which he is liable as principle, subs. 1 will not help him: see *Moore v. Knight*; *Thorne v. Heard*, *ubi sup.* It applies only where the claim is against the trustee as such. *ante*.

Subs. 2 and 3 do not apply as against persons served with a decree

"Trustee."

"Party or privy."

"Still retained."

"Received and converted to his use."

"Conferred by any statute."

"Lapse of time."

"In the like manner," etc.

Proceedings instituted by another beneficiary.

after 1st January, 1889, for general administration, in an action commenced before that date: *Re Harrison*, W. N., 1892, 148.

Right or
defence of
executor or
administrator.

As to the rights or defences to which executors or administrators are entitled under existing statutes of limitation, see 3 & 4 Will. 4, c. 27, s. 40; 23 & 24 Vict. c. 38, s. 13; 37 & 38 Vict. c. 57, s. 8; *Re Johnson*, 29 Ch. D. 964; *Martin v. Earl Beauchamp*, W. N., 1888, 247; *Sutton v. Sutton*, 22 Ch. D. 511, 517; *Re Davis*, 1891, 3 Ch. 119.

As to an executor setting up his own "devastavit," and claiming the benefit of the statute, see *Re Hyatt*, 38 Ch. D. 609; *Re Marsden*, 26 *ib.* 783.

CHAPTER II.

THE TRUST INVESTMENT ACT, 1889.

52 & 53 VICT. c. 32.

An Act to amend the Law relating to the Investment of Trust Funds. [12th August, 1889.]

The whole of this Act—except ss. 1 and 7—was repealed—except as to Scotland—by the T. A. (see s. 51 and Schedule); and see, for re-enactments similar to the parts of this Act which are repealed, ss. 1, 2, 3, 4, and 50 of the later Act.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Trust Investment Act, 1889. Short title.

7. Where the council of any county or borough or any urban or rural sanitary authority are authorized or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares, or securities in which trustees are authorized by this Act to invest, except that such council or authority shall not by virtue of this section invest in any stocks, funds, shares, or securities issued or created by themselves, nor in real or heritable securities. Investments of sinking fund by local authorities.

Provided that it shall not be lawful for any such council or authority to retain any securities which are liable to be redeemed at a fixed time at par or at any other fixed rate and are at a price exceeding their redemption value, unless more than fifteen years will elapse before the time fixed for redemption.

As to the effect of this s. on the question whether a corporation was a trustee within the meaning of the Act, see *Re Manchester Royal Infirmary*, 43 Ch. D. 420, 427.

*Repeal of
enactments in
schedule.*

8. *The enactments specified in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned, but without prejudice to the validity of any act done under any enactment so repealed.*

The repeal of this s. by the T. A. does not revive these enactments : Interpretation Act, 1889, s. 38 (2), (a).

SCHEDULE.

Section 8.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
4 & 5 Will. 4, c. 29.	An Act for facilitating the loan of money upon landed securities in Ireland.	The whole Act.
22 & 23 Vict. c. 35.	An Act to further amend the law of property and to relieve trustees.	Section thirty-two.
23 & 24 Vict. c. 38.	An Act to further amend the law of property.	Section eleven
30 & 31 Vict. c. 132.	An Act to remove doubts as to the power of trustees, executors, and administrators to invest trust funds in certain securities, and to declare and amend the law relating to such investments.	The whole Act.
34 & 35 Vict. c. 47.	The Metropolitan Board of Works (Loans) Act, 1871.	Section thirteen.

CHAPTER III.

THE TRUSTEE ACT, 1893.

56 & 57 VICT. c. 53.

An Act to consolidate Enactments relating to Trustees.

[22nd September, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I.—INVESTMENTS.

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say :

S. 1.
—
INVESTMENTS.
—
Authorized
investments.

For the meaning of the expressions "trust" and "trustee," see s. 50.

It was held that the T. A., 1889, applied to a Corporation holding funds for a charitable purpose : *Re Manchester Royal Infirmary*, 43 Ch. D. 420 (a decision partly based on s. 7 of that Act, which is not re-enacted in this) : but not to a building society whose funds were invested in its own name, or in the names of trustees who had no power to invest : *Re National, &c., Building Society*, *ib.* 431 ; but see now the Building Societies Act, 1894, s. 17.

S. 11 of Lord St. Leonard's Act (23 & 24 Vict. c. 38)—now repealed by the T. A., 1889—had no such exception : see *Re Wedderburn's Trusts*, 9 Ch. D. 112.

Trustees have, unquestionably, under the words of this Act, the power of selling investments not made under it, for the purpose of making investments authorized by it—a power which, after some doubt (see *Re Manchester Royal Infirmary*, *ubi sup.*), it was held they had under the less precise terms of the T. A., 1889 : *Hume v. Lopes*, 1892, A. C. 112.

"Trustee,"
"Trust fund."

"Unless
expressly
forbidden."

"Whether at
the time in a
state of invest-
ment or not."

S. 1.
INVESTMENTS.
—

- (a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom :
(b) On real or heritable securities in Great Britain or Ireland :

“ Real
securities.”

Long terms of years do not answer the description of “ real securities ” within the meaning of a power to invest on real securities: *Re Boyd*, 14 Ch. D. 626; *Re Chennell*, 8 *ib.* 492; but see now s. 5 (1) (a), *infra*. Having regard, however, to the terms of that s. (the marginal note speaks of it as an enlargement of *express* powers of investment, and the terms of the s. seem to bear out the note), it may be questioned whether it extends s. 1 so as to authorize an investment on such a security.

- (c) In the stock of the Bank of England or the Bank of Ireland :
(d) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India :
(e) In any securities the interest of which is for the time being guaranteed by Parliament :
(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District :
(g) In the debenture or rent-charge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock :

Dividend at
3 per cent.

The power given by subs. (g), taken with R. S. C., 1888 (R. S. C., 1883, O. 22, r. 17), is wider: payment of “ a dividend ” for ten years next before the date of investment is enough. S. 4 of the T. A., 1894, allows the retainer of an investment which has ceased to be of the authorized class.

- (h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is

leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in subsection (g), either alone or jointly with any other railway company :

- (i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India :
- (j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway ; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company :

The last clause of this subs. ("also"—"Company") is new.

- (k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed :

The last clause of this subs. ("or upon"—"guaranteed") is new.

- (l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock :

- (m) In nominal or inscribed stock issued, or to be

S. 1.
 INVESTMENTS.

issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

Nominal
 debentures and
 nominal
 debenture
 stock.

S. 5 (3), *infra*, re-enacts s. 27 of the Local Loans Act, 1875 (repealed by this Act), so as to enable trustees to invest on nominal debentures, or nominal debenture stock issued by local authorities under that Act; but it may be questioned (see note to subs. (b) above) whether the powers of s. 5 are an enlargement of the general statutory powers of investment, given by this s. Subs. 3 of s. 5 speaks of "the instrument authorizing the "investment;" and by s. 50 "instrument" includes Act of Parliament.

(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorized by law to be levied:

(o) In any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court,

See R. S. C., 1888 (R. S. C., 1883, O. 22, r. 17), and note to (g), above.

and may also from time to time vary any such investment.

It would seem that a direction to trustees to *appropriate* securities of a particular class to answer a particular purpose—*e.g.* the payment of an annuity—is unaffected by the powers of s. 1. The trustees cannot invest on other securities authorized by the s., even though not expressly forbidden by the instrument creating the trust: see *Re Outhwaite*, 1891, 3 Ch. 494.

2.—(1.) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

SS. 2, 3, 4, 5.

INVESTMENTS.

Purchase at a premium of redeemable stocks.

(2.) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

See also T. A., 1894, s. 4.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

Discretion of trustees.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Application of preceding sections.

5.—(1.) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

Enlargement of express powers of investment.

(a) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

S. 5. See note to s. 1 (b), above.

INVESTMENTS.

27 & 28 Vict.
c. 114.

(b) On any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

This subs. replaces s. 60 of the Act of 27 & 28 Vict. c. 114, repealed by this Act, as to trustees.

(2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorizing the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

This subs. replaces the Debenture Stock Act, 1871, repealed by this Act.

(3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

38 & 39 Vict.
c. 83.

See note on s. 1 (m), above.

(4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorizing the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

43 & 44 Vict.
c. 8.

This subs. replaces s. 7 of the Act 43 & 44 Vict. c. 8, repealed by this Act, as to trustees.

(5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

28 & 29 Vict.
c. 78.

This subs. replaces s. 40 of the Act 28 & 29 Vict. c. 78, repealed by this Act.

SS. 6, 7, 8.

It may be doubted whether s. 5 is intended to enlarge the powers given by s. 1: see the notes to s. 1 (b) and (m).

INVESTMENTS.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

Power to invest, notwithstanding drainage charges.

10 & 11 Vict. c. 32.

This s. replaces s. 37 of 9 & 10 Vict. c. 101; s. 53 of 10 & 11 Vict. c. 32; and s. 61 of 27 & 28 Vict. c. 114, all repealed by this Act.

7.—(1.) A trustee, unless authorized by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

Trustees not to convert inscribed stock into certificates to bearer.

(a) The India Stock Certificate Act, 1863;

26 & 27 Vict. c. 73.

(b) The National Debt Act, 1870;

33 & 34 Vict. c. 71.

(c) The Local Loans Act, 1875;

38 & 39 Vict. c. 83.

(d) The Colonial Stock Act, 1877.

40 & 41 Vict. c. 59.

(2.) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorized to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

This s. replaces s. 4 of (a), s. 29 of (b), s. 21 of (c), and s. 12 of (d), all repealed by this Act.

8.—(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made,

Loans and investments by trustees not chargeable as breaches of trust.

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INVESTMENTS.

provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

This and the following subs. replace s. 4 of the T. A., 1888.

"Can lawfully
lend"—
"By reason
only."

The security must not be one of a class which is attended with hazard (*Blyth v. Fladgate*, 1891, 1 Ch. 337); or which in other respects and independently of value, is improper: *Re Walker*, 59 L. J. Ch. 386, 391.

"Believed to
be"—
"Instructed
and employed."

It was held in *Re Somerset*, 1893, 1 Ch. 231, 253, that the words "believed to be" do not govern the words "instructed and employed," etc. It seems the surveyor must *in fact* be so instructed and employed: see also *Re Walker*, *ubi sup.*

Surveyor's
certificate.

To keep the trustee harmless under this subs., the certificate of the surveyor should show:

- (1) That the loan does not exceed two-thirds of the property as estimated by the surveyor and stated in the report.
- (2) That the surveyor advises to the effect that the loan may be made or that the security is sufficient.

Components of
value.

The Act imposes no condition as to the components of value. They may include buildings, mines, timber, or valuable rights of any kind. It is only necessary that the surveyor advises the value to be sufficient. In the case of mines or timber of large value, he would probably advise some special provisions as to working or cutting.

The statement as to value and the advice must be in the report itself, and not in a subsequent letter or in a postscript to the report. And see, for a case which turned on the sufficiency of a surveyor's report, *Re Walker*, *ubi sup.*

As to the law apart from the Act, see *Fry v. Tapson*, 28 Ch. D. 268; *Smethurst v. Hastings*, 30 *ib.* 490; *Re Whiteley*, 32 *ib.* 196; 33 *ib.* 347; 12 App. Ca. 727; *Re Olive*, 34 Ch. D. 70; *Rae v. Meek*, 14 App. Ca. 558; *Re Salmon*, 42 Ch. D. 351; *Sheffield, &c., Building Society v. Aizlewood*, 44 *ib.* 412.

(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach

of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

SS. 8, 9.

INVESTMENTS.

A trustee purchasing leaseholds is saved, under V. & P. A., s. 2 (1) (taken with s. 15 of this Act), and under C. A., ss. 3 (1), 66, from inquiry into the lessor's title.

Purchase of leaseholds.

(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

9.—(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

Liability for loss by reason of improper investments.

See *Re Somerset*, 1894, 1 Ch. 231, 253-4; *Re Salmon*, 42 Ch. D. 351.

(2.) This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

S. 10.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

PART II.—VARIOUS POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

Power of
appointing
new trustees.

10.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

Executor-
Trustee.

As to an appointment in the room of an executor-trustee, see *Re Moore*, 21 Ch. D. 778; *Brown v. Burdett*, 40 Ch. D. 244, 253; *Re Willey*, W. N., 1890, 1; *Eaton v. Daines*, W. N., 1894, 32.

S. L. A.
trustee.

See s. 47, *infra*, as to the powers of this Act in relation to S. L. A. trustees.

Trustees for
religious, &c.,
purposes.

The powers of this Act for the appointment of new trustees are by s. 3 of the Trustees Appointment Act, 1890, taken with the Interpretation Act, 1889, s. 38 (1), extended to the case of land acquired and held on trust for certain religious and educational purposes.

Retirement
from "all or
any" of the
trusts.

The s. enables a trustee to retire from part only of the trusts, and gets over the questions raised in *Savile v. Couper*, 36 Ch. D. 520; *Re Moss's Trusts*, 37 *ib.* 513, 516, as to whether this could be done without the aid of the Court.

Refusal to act
—Disclaimer.

This s. includes the case of disclaimer. After disclaimer, which relates back, the person disclaiming is considered as never having been a trustee, but up to the time of disclaimer the trust estate remains vested in him, otherwise there would be nothing to disclaim. The estate being vested in him on trust at the moment of disclaimer, he necessarily is then a trustee, and a trustee who refuses, and can then, —but not, of course, afterwards (see *Re Birchall*, *ubi infra*)—exercise the powers of this subs. The estate passes to him without any express

assent, but subject to the right of dissenting: see *Lewin*, 8th ed., 198; *Smith v. Wheeler*, 1 Vent. 128; *Siggers v. Evans*, 5 Ell. & Bl. 367, 382; *Standing v. Bowring*, 31 Ch. D. 282. In *D'Adhemar v. Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was included in the words "trustee who shall refuse to act" under Lord Cranworth's Act, s. 27; see also *Lewin*, 8th ed., 647. Disclaimer of the office of trustee is also a disclaimer of the legal estate: *Re Birchall, Birchall v. Ashton*, 40 Ch. D. 436.

Bankruptcy is unfitness: see *Re Barker's Trusts*, 1 Ch. D. 43; *Re Adams' Trust*, 12 ib. 634; *Re Hopkins*, 19 ib. 61, 63; *Re Roche*, 2 Dru. & War. 287;—though there may be exceptional cases where the Court will not exercise the powers given it by s. 25 (1), *infra* (which replaces s. 147 of the Bankruptcy Act, 1883, repealed by this Act), to remove a bankrupt trustee: see the two first-mentioned cases.

A lunatic is "incapable of acting" (*Re Leman's Trusts*, 22 Ch. D. 633; *Re Elizabeth Blake*, W. N., 1887, 173); and a new trustee can under this s. be appointed in his place (see the latter case); and, consequently, an effectual vesting declaration can be made under s. 12, *infra*. And as to the appointment, in Lunacy, of a new trustee, where the donee of the power is a lunatic: see *Re Shortridge*, 1895, 1 Ch. 278. But the s. does not cover unfitness or incapacity of infancy: *Re Tallaire*, W. N., 1885, 191.

The result is that the person entitled to exercise the powers of appointment given by this s. can effect the removal of an absent, or bankrupt, or lunatic trustee, and, under s. 12, divest him of the trust estate so far as that s. applies.

In settlements made since Lord Cranworth's Act, the form of the power generally is "that A. B. shall have power to appoint new trustees," without specifying in what cases. Under that form, the power being unlimited, A. B. will be the "person nominated for this purpose" within the meaning of this s.: see *Walker & Hughes' Contract*, 24 Ch. D. 698. But if the power expressly specifies the cases in which an appointment may be made, and includes only some of the cases mentioned in this s., then as regards the remaining cases the donee of the power is not "the person nominated for the purpose" within this s., and the appointment must be made by the surviving or continuing trustee or his personal representatives: see *Cecil v. Langdon*, 28 Ch. D. 1. This applies whether the settlement be made before or after the commencement of this Act.

A power to appoint new trustees continues, notwithstanding alienation by the donee of the power of all his interest (*Hardaker v. Moorhouse*, 26 Ch. D. 417), and also notwithstanding a decree in an administration action, but then it should be exercised with the sanction of the Court: *Re Gadd*, 23 Ch. D. 134; *Thomas v. Williams*, 24 ib. 558, 567-8; *Re Hall*, W. N., 1885, 17. But an appointment without the Court's sanction would not be void.

Where persons nominated jointly to appoint fail to agree, an appointment may be made under this s., on the footing of their not being "able and willing": *Re Sheppard's Trusts*, W. N., 1888, 234. *q.v.*

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VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

"Unfit to act."
"Incapable of
acting."
Bankruptcy.

Lunacy.

Infancy.

Person
"nominated
for the purpose
of appointing."

Alienation of
interest by
"person
nominated."
Administration
action.

Person
nominated
unable or
unwilling.

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 ———
 VARIOUS
 POWERS AND
 DUTIES OF
 TRUSTEES.
 ———
 "Continuing
 trustee."

A continuing trustee is one who is to continue to act after the completion of an intended appointment: *Re Coates to Parsons*, 34 Ch. D. 370. A trustee who has made up his mind to retire is not a continuing trustee (but see subs. 4, *infra*), and need not join in an appointment by his co-trustee, unless it is shown that he is willing and competent to act under subs. 4: *Re Coates to Parsons*, *ubi sup.* Nor is he a surviving trustee within the meaning of the power, though he is in fact the actual survivor: *Travis v. Illingworth*, 2 Dr. & Sm. 344.

"Last sur-
 viving or
 continuing
 trustee."
 Personal
 representatives
 of last sur-
 viving trustee.

A continuing sole trustee is not bound to appoint a new trustee: *Peacock v. Colling*, 33 W. R. 528, where, however, the will contemplated a sole trustee acting.

A deceased sole trustee is a "last surviving or continuing trustee": *Re Shafto's Trusts*, 29 Ch. D. 247.

In a case where a sole surviving trustee appointed general executors, and also special executors to execute the trusts, and the general executors obtained probate, and, before any grant to the special executors, appointed new trustees, the appointment was held good: *Re Parker's Trusts*, 1894, 1 Ch. 707. It would appear from the judgment in this case (see p. 721), that executors cannot exercise the powers of this s. before probate is granted, and that it is competent for a testator to appoint special executors for the purposes of a trust estate.

Exercise of
 powers by one
 of several
 executors.

- It seems that the proving and acting personal representatives can alone exercise the power, and that the concurrence of an executor who renounces or does not act is unnecessary (*Earl Granville v. McNeile* 7 Ha. 156), but it is conceived that all proving or acting executors, must join, and the usual practice is to join all.

Personal representatives of a deceased trustee are not bound to exercise the power: *Re Sarah Knight's Will*, 26 Ch. D. 82.

"May by writ-
 ing appoint."
 Donee appoint-
 ing himself.

"Writing" does not include a will: *Re Parker's Trusts*, *ubi sup.*

Donees of the power may not appoint themselves: *Re Skeats*, 42 Ch. D. 522; *Re Newen*, 1894, 2 Ch. 297; and see *Re Shortridge*, 1895, 1 Ch. 278.

Appointment
 by the Court.

The Court will not appoint where there is a person able and willing to do so: *Re Higginbottom*, 1892, 3 Ch. 132; and compare the cases cited in the note above—"Administration Action."

Where a private Act (passed in 1869) incorporated the 27th s. of Lord Cranworth's Act, enabling the appointment of new trustees, with a qualification that every appointment should be made with the approbation of the Court, it was held, after the repeal of the latter Act, that an appointment could be made under the power conferred by C. A., s. 31, and that the qualification did not apply: *Re Lloyd's Trusts*, W. N., 1888, 20.

Costs of
 appointment.

The registrars in the Probate Registry have refused to grant letters of administration merely for the purpose of enabling the power given by this s. to be exercised where there are no assets.

The costs, charges, and expenses of, and incidental to, the appoint-

ment, including those of the donee of the power, are payable out of the trust estate: *Harvey v. Oliver*, 57 L. T., N. S., 239, which shows the items to be included.

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 VARIOUS
 POWERS AND
 DUTIES OF
 TRUSTEES.
 ———

(2.) On the appointment of a new trustee for the whole or any part of trust property—

This subs. applies to appointments under powers in trust deeds, as well as under the statutory powers; see subs. 5 and 6. It enables the appointment of more new trustees than one, as singular includes plural (see last note to C. A., s. 2); but it applies only where there is a vacancy as to the whole or some part of the trust: *Re Gregson's Trusts*, 34 Ch. D. 209; *Re Nesbitt's Trusts*, 19 L. R. Ir. 509.

- (a) The number of trustees may be increased; and
- (b) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

This subs. replaces s. 5 of C. A., 1882, and s. 6 of C. A., 1892, and must be read with the words "all or any of the trusts," &c., "in subs. 1, above. It is conceived that it settles the questions raised in *Savile v. Couper*, and *Re Moss's Trusts* there cited, as to a trustee's power to retire from part only of the trust.

It is conceived that this subs. applies where two funds are for the time being held on distinct trusts, though they may ultimately coalesce: as was the case in *Re Hetherington's Trusts*, 34 Ch. D. 211; *Re Moss's Trusts*, 37 *ib.* 513; in which cases, however, the orders appointing the separate sets of trustees were made on applications under the Trustee Act, 1850; and the Court had, by that Act, power to do so, independently of s. 5 of the C. A., 1882: see *Re Moss's Trusts*, *ubi sup.* But there seems no reason why trusts which are distinct for purposes of the T. A., 1850, should not be so for purposes of this subs.

"Trusts
 distinct."

- (c) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were

S. 10.
 ———
 VARIOUS
 POWERS AND
 DUTIES OF
 TRUSTEES.
 ———

originally appointed ; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust ; and

Lunatic trustee—
 practice in lunacy.

Under the Lunacy Act, 1890, ss. 135, 136, the Judge in Lunacy will now, where a lunatic trustee has two or more co-trustees, vest in them the trust estate, although by so doing, the number of trustees will be diminished (*Re Leon*, 1892, 1 Ch. 348); thus altering the former practice in lunacy, as laid down in *Re Aston*, 23 Ch. D. 217.

Practice in High Court.

As to the practice of the High Court in keeping up the full number of trustees, see note on s. 25 (1) *infra*.

Appointment of less than original number valid or void.

Under Lord Cranworth's Act, the appointment of a single trustee was not invalid (*West of England Bank v. March*, 23 Ch. D. 138, 146); but where there is a contrary intention expressed in the instrument creating the trust, it would be: *Re Mercer*, 38 Solicitors' Jour. 338; *Hulme v. Hulme*, 2 Myl. & K. 682; *Earl of Lonsdale v. Beckett*, 2 De G. & Sm. 72; and subs. 5, *infra*.

- (d) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

This subs. must be read in connection with s. 12 (1), *infra*, rendering a conveyance of the trust property unnecessary, except in cases within subs. 3 of that s.

(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

Trustee dying before testator.

The first clause of this subs. does not enable the personal representatives of a person nominated trustee, but dying before the testator, to

appoint under subs. 1; the deceased person was never a surviving or continuing trustee: *Nicholson v. Field*, 1893, 2 Ch. 511.

On the second clause, see subs. 1, above, note "Continuing Trustee," and *Re Coates to Parsons*, there cited. *and*.

SS. 10, 11.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

Retiring
trustee willing
to act.

Where under an instrument, whether dated before this Act or subsequently, a limited power to appoint new trustees is given to a specified person, say, in case only of trustees refusing, the power given to the surviving or continuing trustee by subs. 1 applies to all the other cases there mentioned, and the omission to provide for all those cases is not sufficient to show a contrary intention within this subs.: see *Cecil v. Langdon*, 28 Ch. D. 1; *Re Coates to Parsons*, 34 *ib.* 370; *Re Lloyd's Trusts*, W. N., 1888, 20. *and*.

"Contrary
intention."

For cases of contrary intention as to number of trustees, see the three cases cited at end of note to subs. 2 (c), *supra*.

(6.) This section applies to trusts created either before or after the commencement of this Act.

S. 10 of this Act replaces C. A., s. 31; C. A., 1882, s. 5; and C. A., 1892, s. 6.

11.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Retirement of
trustee.

Under this subs. the continuing trustees alone will have the powers of the original trustees. The due discharge of one of several trustees leaves the others whole and sole trustees as in case of a disclaimer: *Cafe v. Bent*, 5 Hare, 37. If the power be merely personal, unconnected with property—for instance, to consent to a marriage—it is not a case of trusteeship within s. 10 and this s. It might have been disclaimed under C. A., 1882, s. 6; but cannot, it would seem, be released under C. A., s. 52: see *Re Eyre*, and *Weller v. Ker*, there cited.

SS. 11, 12.

—
VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.
—

No discharge
from part of
trusts.

This subs. does not contain the words "all *or any* of the trusts or powers," &c., which occur in s. 10 (1); and it is conceived that a trustee cannot, under it, be discharged from part of "the trust."

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

This subs. must be read in connection with s. 12 (2), *infra*.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"Contrary
intention."

For "contrary intention" as to number, see the cases cited in the note to s. 10 (2) (c), above.

(4.) This section applies to trusts created either before or after the commencement of this Act.

This s. replaces s. 32 of the C. A.

Vesting of
trust property
in new or
continuing
trustees.

12.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting
declaration on
all appoint-
ments.

This s. applies to all deeds executed after the commencement of the C. A. by which a new trustee is appointed to perform "any trust," and is not confined to cases where the powers of that Act or this Act are exercised. As singular includes the plural, it also applies where more new trustees than one are appointed. The vesting declaration may therefore now be used on an appointment of a trustee in the ordinary mode under a power in a settlement, and whether the settlement be dated before or after the commencement of the C. A. It must be by deed, and not by writing merely, though the mere appointment of

Must be by and
in same deed.

a trustee under either Act may be by writing only; and it must be contained in the deed appointing or discharging the trustee.

Thus, as under the old practice, a deed will always be necessary where there is property to transfer, and will be chargeable with stamp duty on the appointment and also on the vesting declaration (*Hadgett v. Commissioners of Int. Rev.*, 3 Ex. D. 46). In the case of a chose in action notice of assignment should be given.

The aid of this s. is required only for the purpose of vesting a legal interest. The mere appointment of a new trustee or several new trustees in itself operates to vest all equitable interests in the persons who are the trustees (*Dodson v. Powell*, 18 L. J. Ch. 237), and the object of this s. is to extend that principle, so far as is not inconvenient, to legal estates and rights. It may, however, be convenient to have the proper declaration in all cases.

The words "who by virtue of the deed become and are *the* trustees for performing the trust" include the old trustees as well as the new. The new trustees become trustees by virtue of the deed, but do not become *the* trustees for performing the trust, unless they are the sole trustees. The new and the old trustees together become the trustees for performing the trust. But where there are no old trustees, or none continuing to act, the new trustees solely become the trustees for performing the trust.

Cases occur, as where lands are purchased with settlement money, in which it may be convenient to have a separate actual conveyance. The declaration which effects the vesting of the other property subject to the settlement will then omit the property separately conveyed.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

S. 12.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

Stamp duties.

Chose in

action.

No declaration
for equities.

Effect of
vesting clause.

Where there
should be
separate deed.

The objects of subs. 3 are to save the rights of the lord as regards

Reasons for
exemptions.

SS. 12, 13.

—
VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.
—

Surrenderee
not admitted.Vesting order
made.Trust property
outstanding.

customary land (which does not, it is conceived, include gavelkind land), to prevent the trusts of the money appearing on the title of land mortgaged, and to reserve to companies and other bodies the right to require transfers of their stock to be made in the statutory form.

The right of a surrenderee of copyholds before admittance is a legal interest (*Jarm. on Wills*, vol. i. pp. 58, 59, 4th ed.; *Wainwright v. Elwell*, 1 *Mad.* 627; and *Phillips v. Phillips*, 1 *Myl. & K.* 664, there cited), which is not within this s.

As to property to which the vesting declaration does not apply, and of which a transfer cannot be obtained, a vesting order will be made: *Re Harrison's Settlement*, W. N., 1883, 31; *Re Keeley's Trusts*, 53 *L. T.* 487.

The vesting declaration applies only to an estate subject to the trust vested in a person who was or is trustee. A transfer of an estate outstanding in any one else must be obtained in the ordinary way. Thus, suppose an equity of redemption to be conveyed on trust for sale, and the mortgage debt to be afterwards paid off, the mortgagee becomes a trustee of the legal estate, but not a trustee under the deed of trust for sale. On an appointment of new trustees of the deed the vesting declaration would not operate to get in the legal estate vested in the mortgagee.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

Registry
searches.

This subs. makes it necessary to search in Deeds Registries against any person having power to appoint new trustees as well as against the trustees.

(5.) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

This s. replaces C. A., s. 34.

Purchase and Sale.

Power of
trustee for sale
to sell by
auction, &c.

13.—(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract. subject to any such conditions respecting title or

evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

SS. 13, 14.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

This s. operates to supply the common form provisions of a trust for sale or a power of sale.

As to the force of the words "any part of the property," see *Batcheldor v. Yates*, 38 Ch. D. 112; *Dayrell v. Hoare*, 12 A. & E. 356; *Buckley v. Howell*, 29 Beav. 546.

Any part.

"Subject to any such conditions:" as to the extent of the trustee's discretion, compare *Hawksley v. Outram*, 1892, 3 Ch. 359.

Terms of sale.

As to the duty of trustees where trust property is sold along with other property not subject to the trust, see *Rede v. Oakes*, 4 D. J. & S. 505; *Cooper & Allen's Contract*, 4 Ch. D. 802; *Re Parker & Beech's Contract*, W. N., 1887, 27. The trustees must exercise their powers in a reasonable manner: *Dunn v. Flood*, 25 Ch. D. 629; 28 *ib.* 586, 591; but as to depreciatory conditions of sale, see s. 14.

As to sale of
trust property
along with
other property.

A sufficient trust for sale may now be created by using the words "upon trust to sell the said premises," and a sufficient power of sale by using the words "with power to sell the said premises," without more, and the survivors can sell (see s. 22); but it is advisable to specify precisely who are to execute the trust or power.

Words re-
quired in trust
for or power
of sale.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the thirty-first of December one thousand eight hundred and eighty-one.

This s. replaces C. A., s. 35.

14.—(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

Power to sell
subject to
depreciatory
conditions.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to

SS. 14, 15, 16,
17.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section applies only to sales made after the twenty-fourth day of December one thousand eight hundred and eighty-eight.

This s. replaces T. A., 1888, s. 3; and as to the law apart from Statute, see *Dunn v. Flood*, cited on s. 13, above.

Power to sell
under
37 & 38 Vict.
c. 78.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874.

This s. replaces V. and P. A., s. 3. For a like indemnity to a trustee adopting the C. A., see C. A., s. 66.

Married woman
as bare trustee
may convey.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a feme sole.

This s. replaces V. and P. A., s. 6; and see the note to the repealed s. on p. 11, *supra*.

Various Powers and Liabilities.

Power to
authorize
receipt of
money by
banker or
solicitor.

44 & 45 Vict.
c. 41.

17.—(1.) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

An attorney of a trustee, under a *general* power of attorney, cannot authorize a receipt under this (or, it would seem, the following) subs. (*Re Helling & Merton*, 1893, 3 Ch. 269); though with express power he could: S. C., p. 280.

Though this subs. uses the expression "deed *containing* any such receipt as referred to in" C. A., s. 56, it is conceived that it applies where the receipt is indorsed as well as where it is in the body of the deed. The indorsement is part of the deed, and moreover an indorsed receipt is expressly referred to in s. 56.

Where the solicitor is himself one of the trustees it is conceived that this subs. does not enable payment to be made to him as solicitor for himself and co-trustees. Such payment would be a payment to one of several trustees and not a good payment.

And it is conceived that payment to a solicitor producing a deed of release executed by trustees would not be a sufficient discharge for the money or property in respect of which the release is given: see note to C. A., s. 56.

(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of, and to produce, the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

There is nothing as to a policy of assurance in C. A., s. 56; it would seem, therefore, that payment is more safely made to a trustee's solicitor producing a policy, than to an ordinary person's solicitor: *Viney v. Chaplin*; *Ex parte Swinbanks*, cited on C. A., s. 56.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4.) This section applies only where the money or valuable consideration or property is received after the twenty-fourth day of December one thousand eight hundred and eighty-eight.

S. 17.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

"A trustee."

Indorsed
receipt.

Solicitor also a
trustee.

Payment on
release.

SS. 17, 18.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

(5.) Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

This s. replaces T. A., 1888, s. 2, with the addition, for its special purposes, of the general saving in s. 12 (2) of that Act. The special re-enactment in this s., of s. 12 (1) of that Act (which makes the Act apply generally as well to trusts created by instrument executed before, as to trusts created after, its passing), is unnecessary, owing to the express terms of subs. 4: compare C. A., s. 56.

Power to
insure
building.

18.—(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This s. replaces T. A., 1888, s. 7, with the addition, for its special purposes, of the general enactment in s. 12 of that Act.

As to the law apart from the Act, see *Re Fowler*, 16 Ch. D. 723; *Fry v. Fry*, 27 Beav. 147; Lewin on Trusts, 8th ed., 580. And as to a trustee's right to indemnity out of the trust property for money expended in its preservation, see *Re Leslie*, 23 Ch. D. 552; *Falcke v. Scottish Imperial Insurance Co.*, 34 ib. 234; *Re Earl of Winchilsea*, 39 ib. 168.

The s. was not meant to alter the incidence of the payments as between tenant for life and remainderman: *Re Baring*, 1893, 1 Ch. 61, for the principles as to which, see that case, and *Re Courtier*, 34 Ch. D. 136; *Debney v. Eckett*, 39 Sol. J., 44.

19.—(1.) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2.) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This s. replaces T. A. 1888, ss. 10, 11, with the addition, for its special purposes, of s. 12 of that Act. The s. is not intended to alter

S. 19.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

Power of
trustees of
renewable
leaseholds to
renew and
raise money
for the
purpose.

SS. 19, 20, 21.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

Power of
trustee to
give receipts.

liabilities as between tenant for life and remainderman: *Re Baring*, 1893, 1 Ch. 61. The costs of carrying out the powers of the s. are distributable between those persons in proportion to their enjoyment of the estate: see that case.

20.—(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Receipt clause
extended.

This s. replaces C. A., s. 36. It and that s. are more comprehensive than s. 29 of Lord Cranworth's Act, which was confined to money payable under trusts or powers created after the passing of that Act (s. 34). The power to give receipts conferred by 22 & 23 Vict. c. 35, s. 23, had a similar limited operation: see Lewin on Trusts, 8th ed., p. 452.

Application of
this s.

Where trustees for sale, having no express power to give receipts, had sold to a railway company, the power given by this Act was held to apply, and the purchase-money, which had been paid into Court, was ordered to be paid to them without serving the *cestuis que trust* (*Thomas's Settlement*, W. N., 1882, 7); but the Court may refuse: *Re Smith*, 40 Ch. D. 386.

Effect of
statutory
receipt clause.

All trustees having now a complete statutory power to give a discharge for the funds of which they are trustees, it not only is not necessary to inquire as to a receipt clause, but it is also not material to inquire whether the funds have become vested absolutely in any beneficial owner, which would put an end to the operation of the receipt clause operating by contract only. In every case payment or transfer to duly appointed trustees operates as a good discharge whatever may be the position of the beneficial ownership. Though this s. is expressly made retrospective so as to include trusts created before 1894, yet it only applies to receipts under such trusts after 1893. C. A., s. 36, covers receipts given between 1881 and 1894: see the Interpretation Act, 1889, s. 38 (2) (b).

Not retro-
spective as to
receipts.

Power for
executors and
trustees to
compound, &c.

21.—(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor or administrator, or two or more

trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whether relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4.) This section applies to executors, administrators and trusts constituted or created either before or after the commencement of this Act.

This s. replaces C. A., s. 37, but extends to an administrator, who was not within that s.: *Re Clay & Tetley*, 16 Ch. D. 3.

It is conceived that where there are two or more trustees they must all act together under this s., except in trusts of a public character, or where there is a special authority for the majority to bind the minority: see Lewin on Trusts, 8th ed., pp. 259, 591; *Luke v. South Kensington Hotel Co.*, 11 Ch. D. 121, 125-6.

And see, on the powers of compromise, &c. given by the s., *West of England Bank v. Murch*, 23 Ch. D. 138; *Sheffield &c. Building Society v. Aizlewood*, 44 ib. 412, pp. 461-8; *Sneath v. Valley Gold, Limited*, 1893, 1 Ch. 477; *Mercantile Investment Co. v. International Co. of Mexico, ib.*, p. 484, n.; *The same v. River Plate Trust &c. Co.*, 1894, 1 Ch. 578; *Re Lands Allotments Co.*, ib. 616, 630, 637.

SS. 21, 22.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

22.—(1.) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating

Powers of two
or more
trustees.

SS. 22, 23, 24. the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

(2.) This section applies only to trusts constituted after or created by instruments coming into operation after the thirty-first day of December one thousand eight hundred and eighty-one.

As to survivor of executors selling. *As to an executor who renounces probate, see 20 & 21 Vict. c. 77, s. 79, and Crawford v. Forshaw, 43 Ch. D. 643; and, on appeal, 1891, 2 Ch. 261.*

As to survivor of executors selling. This s. removes any difficulty as to whether one surviving executor can sell under a devise to executors to sell (see Sug. Powers, 126 *et seq.*, 8th ed.); but it does not affect the rule that a power to two or more by name, who are not executors, being a personal power, will not survive: Sug. Powers, 128, 8th ed.

Executor renouncing. As to an executor who renounces probate, see 20 & 21 Vict. c. 77, s. 79, and *Crawford v. Forshaw*, 43 Ch. D. 643; and, on appeal, 1891, 2 Ch. 261.

Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

This s. replaces s. 26 of Lord St. Leonard's Act (22 & 23 Vict. c. 35): compare C. A., s. 47; and see Lewin on Trusts, 8th ed., pp. 353-4.

Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for

any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

SS. 24, 25.

VARIOUS
POWERS AND
DUTIES OF
TRUSTEES.

This s. replaces s. 31 of Lord St. Leonard's Act (22 & 23 Vict., c. 35): see Lewin on Trusts, 8th ed., p. 274; *Speight v. Gaunt*, 9 App. Ca. 1; *Re Brier*, 26 Ch. D. 238; and Lord Selborne's remarks, at p. 243, as to the effect of the enactment.

PART III.—POWERS OF THE COURT.

POWERS OF
THE COURT.

Appointment of New Trustees and Vesting Orders.

25.—(1.) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

Power of the
Court to
appoint new
trustees.

This subs. replaces T. A., 1850, s. 32; T. A., 1852, ss. 8, 9; s. 332 of the Irish Bankrupt and Insolvent Act, 1857; and s. 147 of the Bankruptcy Act, 1883 (English).

See *Re Smirthwaite's Trusts*, 11 Eq. 251; *Re Dixon's Trusts*, 12 ib. 214; *Re Gillett's Trusts*, 25 W. R. 23; *Re Moore*, 21 Ch. D. 231.

No existing
trustee.

and: See, as to the principle on which the discretionary power of the Court to remove a bankrupt trustee will be exercised, *Re Adams' Trust*, 12 Ch. D. 634; *Re Barker's Trust*, 1 ib. 43.

Bankrupt
trustee.

As to the practice of the Court in keeping up the full original number of the trustees, see *Re Gardiner's Trusts*, 33 Ch. D. 590; *Re Fowler's Trusts*, W. N., 1886, 183; *Re Price*, W. N., 1894, 169; *Oddy v. Hardcastle*, 39 Sol. J., 134; and compare *Re Leon*, 1892, 1 Ch. 348.

Diminution in
number.

(2.) An order under this section, and any consequential vesting order or conveyance, shall not operate further or

SS. 25, 26.

POWERS OF
THE COURT.

otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

This subs. replaces T. A., 1850, s. 36.

(3.) Nothing in this section shall give power to appoint an executor or administrator.

See, as to appointment of a trustee in place of one who was executor, *Re Moore*, 21 Ch. D. 231; *Re Willey*, W. N., 1890, 1; *Eaton v. Daines*, W. N., 1894, 32.

Vesting orders
as to land.

26. In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee: and

See T. A., 1850, s. 34; T. A., 1852, s. 8; Bankruptcy Act, 1883, s. 147.

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(a) Is an infant, or

(b) Is out of the jurisdiction of the High Court, or

(c) Cannot be found; and

See T. A., 1850, ss. 7–12.

Mortgagor a
trustee.

A mortgagor of copyholds, who has covenanted to surrender, or of freeholds by deposit of deeds and memorandum of charge, is a trustee within this subs.; see *Re Crowe's Mortgage*, 13 Eq. 26; *Re D. Jones & Co's Mortgage Trusts*, W. N., 1888, 217; Seton, 5th ed., p. 1030.

Estates tail.

As to estates tail, see note on s. 32, *infra*.

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

See T. A., 1850, s. 13.

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

See T. A., 1850, s. 14.

- (v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

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 —
 POWERS OF
 THE COURT.
 —

See T. A., 1850, s. 15; C. A., s. 30; *Re Pilling's Trusts*, 26 Ch. D. 432; Seton, 5th ed., 1030; *Re Williams' Trusts*, 36 *ib.* 231; and for meaning of "devisee," see s. 50, *infra*.

- (vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

See T. A., 1852, s. 2; and as to the extent of operation of that s., and what is wilful refusal and neglect, see *Re Mills' Trusts*, 37 Ch. D. 312; 40 *ib.* 14.

A petition for an order under this subs. should not be presented before the twenty-eight days have run out: see *Re Knox's Trusts*, 1895, Ch. 538.

A mortgagor may be within this subs.: *Re Crowe's Mortgage*, 13 Mortgagor. Eq. 26.

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

- (a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

See T. A., 1850, s. 34; T. A., 1852, s. 8.

SS. 26, 27, 28.

POWERS OF
THE COURT.

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

See T. A., 1850, s. 10. It was decided on that s. that a vesting order thereunder did *not* sever the joint tenancy: *Smith v. Smith*, 3 Drew, 72; *Re Marquis of Bute's Will*, John. 15 (*Re Pearson*, 5 Ch. D. 982, was a case on T. A., 1850, s. 3, as to the jurisdiction in Lunacy, and seems to have been decided "*per incuriam*": see *Re Vicat*, 33 Ch. D. 103; s. 3 is worded much the same as s. 10, and the cases on s. 10 are not mentioned in *Re Pearson*); and it is submitted, that having regard to the wording of this s., and of s. 32, *infra*, no such question arises under this Act.

"With some other person."

The Court will not insist on "some other person" being brought in, though the result be a diminution in the number of trustees: see *Re Price*, W. N., 1894, 169; *Oddy v. Hardcastle*, 39 Sol. J., 134.

Orders as to
contingent
rights of
unborn
persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled to or possessed in the land.

Estates tail.

See T. A., 1850, s. 16.

As to estates tail, see Seton, 5th ed., pp. 1066-7.

Vesting order
in place of
conveyance by
infant
mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

See T. A., 1850, ss. 7, 8.

Mortgagee of
copyholds.

For an order vesting in the executors of a mortgagee of copyholds the estate of his infant customary heir, see *Re Franklyn's Mortgages*, W. N., 1888, 217; Seton, 5th ed., 1030.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely,—

- (a) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and
- (b) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and
- (c) Where it is uncertain which of several devisees of the mortgagee was the survivor; and
- (d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and
- (e) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

This s. replaces T. A., 1850, s. 19.

The conditions made necessary by subs. (b) are stricter than those required by s. 26 (vi.), to enable a vesting order to be made on a trustee's refusal. The mortgagee's refusal must have been *in writing* or a proper conveyance must have been tendered him: see *Rowley v. Adams*, 14 Beav. 130, and Seton, 5th ed., pp. 1029, 1049.

Subs. (c) is not extended to the case of uncertainty as to which was

S. 29.

POWERS OF
THE COURT.

Vesting order
in place of
conveyance by
heir, or devisee
of heir, &c., or
personal
representative
of mortgagee.

Mortgagee's
refusal.

Survivor of
devisees.

SS. 29, 30, 31.

POWERS OF
THE COURT.Vesting order
consequential
on judgment
for sale or
mortgage of
land.

the survivor of several personal representatives; the fact is immaterial. The estate passes to the personal representatives for the time being, except in the case of copyholds: see C. A., s. 30.

Subs. (e) applies, pending litigation in the Probate Division as to a will appointing executors of a surviving mortgagee: see *Re Cook's Trusts*, 39 Sol. J. 331: and see, for form of order, S. C., W. N. 1895, 60. 1895. 1. Ch. 700 -

30. Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein *as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made*, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person.

The words in italics are repealed by T. A., 1894, s. 1. But for the repeal the s. might be held to be limited to the case of a sale or mortgage for debts: see *Weston v. Filer*, 5 De G. & Sm. 608. With the repeal, it replaces T. A., 1850, s. 29, as extended by T. A., 1852, s. 1, (see *Beckett v. Sutton*, 19 Ch. D. 646, for the extent of the later s.), and extends the powers of those ss. to vesting orders on mortgages, which, though made under them in practice, were not in terms authorized: see Seton, 5th ed., pp. 1057-8, 1069.

The powers of this s. extend to sales under s. 5 of the Intestates Estates Act, 1884: see the Interpretation Act, 1889, s. 38 (1).

“Bound by
judgment.”

As to binding persons not parties to proceedings, see *May v. Newton*, 34 Ch. D. 347.

As to the order being conclusive in favour of a purchaser, see C. A., s. 70.

Vesting order
consequential
on judgment
for specific
performance,
&c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of the election or otherwise, the High Court may declare that any of the parties to the action are

trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

SS. 31, 32.

POWERS OF
THE COURT.

This s. replaces T. A., 1850, s. 30.

For the form of order where an infant is defendant in a foreclosure action, see *Mellor v. Porter*, 25 Ch. D. 158—a case which goes into the question when an infant will be given a day to show cause, and when not. Many of the forms of orders (see Seton, 5th ed., pp. 1057 and onwards) under this s. are in terms prospective,—and see *Boura v. Wright*, 4 De G. & Sm. 265; but see, as to this, *Mellor v. Porter*, *ubi sup.*; *Re Bolton*, W. N., 1888, 243; *Re Shortridge*, 1895, 1 Ch. 278, 285.

Infant mort-
gagor in fore-
closure action.

It would seem that there must be an order for conveyance to bring a case within this s.: see *Weston v. Filer*, 5 De G. & Sm. 608; *Mellor v. Porter*, *ubi sup.*

As to estates tail, see Seton, 5th ed., pp. 1066–7.

Estates tail.

The heir of a living person is an “unborn person” within this s.: *Barnett v. Mozon*, 20 Eq. 182.

“Unborn
persons.”

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed

Effect of
vesting order.

SS. 32, 33, 34. a conveyance or release to the effect intended by the order.

**POWERS OF
THE COURT.**

This s. combines several enactments in the separate ss. of the T. A., 1850, and the T. A., 1852, enabling vesting orders to be made. It must be read with the definition, in s. 50, *infra*, of the words "convey" and "conveyance."

Estates tail.

As to estates tail, see Seton, 5th ed., pp. 1066-7.

Severance of
joint tenancy.

As to a vesting order for the estate of one joint tenant working no severance of the joint tenancy, see note on s. 26 (b), above.

Power to
appoint person
to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

This s. replaces T. A., 1850, s. 20.

Covenants for
title.

The person appointed to convey will give the statutory covenant for title implied by C. A., s. 7 (1) (F), but can give no covenant for title on the part of the person for whom he conveys: *Cowper v. Harmer*, W. N., 1887, 186; compare *Re Fox*, 33 Ch. D. 37.

Effect of
vesting order
as to copyhold.

34.—(1.) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2.) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

This s. replaces T. A., 1850, s. 28.

See, on the s., Seton, 5th ed., pp. 1030-2, 1065, and *Bristow v. Booth*, L. R. 5 C. P. 80.

The s. does not apply *only* to cases where the persons in whose place the appointment was made were under disability: see *Beckett v. Sutton*, 19 Ch. D. 646.

SS. 34, 35.

POWERS OF
THE COURT.

35.—(1.) In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

“Free from disability.”

Vesting orders as to stock and choses in action.

Compare T. A., 1850, s. 35; T. A., 1852, s. 6.

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

For the meaning of “stock,” see s. 50, *infra*.

Choses in action can be passed by a vesting declaration under s. 12, above.

“Stock.”

“Chose in action.”

(a) Is an infant, or

Compare T. A., 1850, s. 3.

As to the powers of the Court where the infant has a beneficial interest in the stock, see the definition of “trust” and “trustee” in s. 50, *infra*, and *Re Harwood (infants)*, 20 Ch. D. 536; *Re Findlay (an Infant)*, 32 *ib.* 221, 641; *Re Alice Kemp*, W. N., 1888, 138; *Re Barnett's Estate*, W. N., 1889, 216.

Infant also beneficiary.

(b) Is out of the jurisdiction of the High Court, or

(c) Cannot be found; or

For cases (b) (c), compare T. A., 1850, ss. 22, 25.

(d) Neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

Compare T. A., 1850, ss. 23, 24, 25.

New trustees are persons absolutely entitled within this subs.: *Re Russell*, 1 Sim. N. S., 404; *Re Baxter's Trusts*, 2 Sm. & G. App. V.; *Re Ellis's Settlement*, 24 Beav. 426.

Person absolutely entitled.

A petition for an order under this subs. should not be presented before the twenty-eight days have run out: see *Re Knox's Trusts*, 1895, 1 Ch. 538.

(e) Neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for

S. 35.
 POWERS OF
 THE COURT.

or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him ; or

Compare T. A., 1852, ss. 4, 5.

- (iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

Compare T. A., 1850, ss. 22, 25.

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint :

Provided that—

- (a) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment are the trustees ; and

Compare T. A., 1850, s. 35.

- (b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

Compare T. A., 1850, ss. 22, 24 ; T. A., 1852, s. 3 ; and see *Re Price*, W. N., 1894, 169 ; and note on s. 26 (b), above.

(2.) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

Compare T. A., 1850, s. 20.

(3.) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order, and the

Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

SS. 35, 36.

POWERS OF
THE COURT.

Compare T. A., 1850, ss. 26, 55; T. A., 1852, ss. 6, 12.

As to a foreign company, see n. to s. 50, *infra*, as to the expression "stock."

"All other
companies."

(4.) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

Compare T. A., 1850, ss. 26, 55.

(5.) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

Compare T. A., 1850, s. 31; and see *Re New Zealand Trust &c. Co.*, 1893, 1 Ch. 403; *Re Gregson*, 1893, 3 Ch. 233; *Re Jolliffe's Trusts*, W. N., 1893, 84; *Re Price*, W. N., 1894, 169.

(6.) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Compare Merchant Shipping Act Amendment Act, 1855, s. 10, repealed by this Act; and see Merchant Shipping Act, 1894, s. 29.

36.—(1.) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

Persons
entitled to
apply for
orders.

(2.) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

SS. 36, 37, 38,
39.

POWERS OF
THE COURT.

"Interested."

Mode of
application.

Powers of new
trustee ap-
pointed by
Court.

Compare T. A., 1850, s. 37.

A contingent interest is enough: *Re Sheppard's Trusts*, 4 D. F. & J. 423. For the distinction between contingent interests which the law will recognize and those which it will not, see *Davis v. Angel*, *ib.* 524; *Clowes v. Hilliard*, 4 Ch. D. 413; *Re Parsons*, 45 *ib.* 51.

For mode of application under this Act, see R. S. C., 1883, O. 54, B; O. 55, r. 13 A.

37. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Compare T. A., 1850, s. 33, and C. A., s. 33, and s. 129 of the Lunacy Act, 1890.

This s. replaces C. A., s. 33, which in turn replaced s. 27 of Lord Cranworth's Act, and applied to all instruments past and future. A new trustee appointed by the Court under its ordinary jurisdiction in equity could not before that Act exercise a legal power, as, for instance, a power of sale in a settlement operating by revocation and appointment of uses (see *Newman v. Warner*, 1 Sim. N. S. 457, 461), and an appointment made on petition under T. A., 1850, s. 33, was no more effectual. As to trustees appointed by the Court of Chancery, see *Morg. Ch. Acts*, 79, 6th ed.

Power to
charge costs
on trust
estate.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as the Court may seem just.

This s. replaces T. A., 1850, s. 51. Compare C. A., s. 69 (7), and S. L. A., ss. 46 (6), 47.

The words "by such persons" are new: see *Re Sarah Knight's Will*, 26 Ch. D. 82, 91, 92; see also *Judicature Act*, 1890, s. 5; *Re Fisher*, 1894, 1 Ch. 53, 450; *Re Knox's Trusts*, 1895, 1 Ch. 538.

Trustees of
charities.

39. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over

which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

SS. 39, 40, 41.

POWERS OF
THE COURT.

This s. replaces T. A., 1850, s. 45. See also, in relation to certain societies for religious purposes, the Trustee Appointment Acts, 1850 to 1890 (the last of which—52 & 53 Vict. c. 19—is cited in the note to s. 10 (1), *suprà*); and the Interpretation Act, 1889, s. 38 (1).

40. Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is the heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

Orders made upon certain allegations to be conclusive evidence.
53 & 54 Vict. c. 5.

This s. replaces T. A., 1850, s. 44, and s. 140 of the Lunacy Act, 1890.

This s. does not include an allegation that a trustee or mortgagee has died intestate and *without a personal representative*, which fact, under s. 26 (v) and s. 29 (e), is a ground for a vesting order. It was probably considered that as the fact could be ascertained by search in the Probate Court, no other evidence should be allowed.

"Without an heir": why not "without a personal representative"?

See, however, C. A., s. 70, under which, as against a purchaser, the order cannot be invalidated on the ground of want of jurisdiction.

41. The powers of the High Court in England to make vesting orders under this Act shall extend to all

Application of vesting order to land out of England.

SS. 41, 42.

POWERS OF
THE COURT.High Court in
Ireland.

land and personal estate in Her Majesty's dominions, except Scotland.

By T. A., 1894, s. 2, these powers are extended to the High Court in Ireland.

Payment into Court by Trustees.

Payment into
Court by
trustees.

42.—(1.) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

This s. replaces s. 32 of the Legacy Duty Act (36 Geo. 3, c. 52); the Trustee Relief Act, 1847; its Amendment Act of 1849, and the Trustee Relief Act (for Ireland), 1848—all which enactments are repealed by this Act.

See R. S. C. (Trustee Act), 1893, rr. 4, 5 (R. S. C., 1883, O. 54 B., r. 4; O. 55, r. 13 A.); Supreme Court Funds Rules, 1894, r. 41; and the Direction of the Judges of the Chancery Division, given in the Appendix to the Weekly Notes, 1894—"Orders and Rules," p. 1.

Payment into
the P.O.
Savings Bank.

Under 50 & 51 Vict. c. 43, s. 70, the County Courts Act, 1888, trust funds not exceeding in value £500 may be paid into the Post-office Savings Bank in the name of the County Court Registrar, to attend the orders of that Court.

Miscellaneous.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Compare T. A., 1850, s. 49; and see Annual Practice, 1894, note to R. S. C., 1883, O. 16, r. 8.

A petition or summons for appointment of new trustees in place of trustees absconding or not to be found need not be served on the latter: see *Re Nicholson's Trusts*, W. N., 1884, 76; *Hyde v. Benbow*, *ib.* 117.

44.—(1.) Where a trustee is for the time being authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

Power to sanction sale of land or minerals separately.

(2.) Any such trustee, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3.) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

This s. is now amended by T. A., 1894, s. 3, by the insertion, after the word "trustee" in the first two places where it occurs, of the words "or other person."

SS. 43, 44.

POWERS OF
THE COURT.

Power to give judgment in absence of a trustee.

Amendment by T. A., 1894.

SS. 44, 45, 46.

POWERS OF
THE COURT.Mortgagee
with power of
sale.

As amended, it replaces s. 2 of the confirmation of Sales Act, 1862 (25 & 26 Vict., c. 108), and has the effect of extending it to Ireland; and includes a mortgagee with a power of sale: *Re Beaumont's Mortgage Trusts*, 12 Eq. 86; *Re Hirst's Mortgage*, 45 Ch. D. 263; *Re Merchants' Trust and New British Iron Co.* (decided under this s. before the Amendment), 38 Sol. J. 253.

As to the mode of application, see R. S. C. (Trustee Act), 1893, r. 3 (R. S. C., 1883, O. 54, B. rr. 2, 3); and, as to service of the application, see *Re Hirst's Mortgage*, *ubi sup.*

See also S. L. A., ss. 4, 17; S. L. A., 1890, s. 5; and compare C. A., s. 19 (i), and note.

Power to make
beneficiary
indemnify for
breach of trust.

45.—(1.) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the twenty-fourth day of December one thousand eight hundred and eighty-eight, and is pending at the commencement of this Act.

This s. replaces T. A., 1888, s. 6.

"Breach of
trust."

The beneficiary must have been cognizant at least of the facts constituting the breach of trust, if not of their legal effect: *Re Somerset*, 1894, 1 Ch. 231, 274. *ante*.

"In writing."

The words "in writing" apply only to the "consent," not to the instigation or request: *Re Somerset*, *ubi sup.*

Discretion of
Court.

The Court is not bound, in all events, to enforce this s., but has a discretion, as to which see *Re Somerset*, *ubi sup.*—especially the judgment of Davey, L. J., at pp. 274-6.

As to the nature, apart from the s., of the indemnity to which a trustee is entitled in such a case, see that judgment, at p. 275; and *Raby v. Ridehalgh*, 7 D. M. & G. 104; *Sawyer v. Sawyer*, 28 Ch. D. 595; also *Butler v. Butler*, 5 Ch. D. 554, 557; Lewin on Trusts, 8th ed., p. 911; also, *Bolton v. Curre*, 1895, 1 Ch. 544.

Jurisdiction of
palatine and
county courts.

46. The provisions of this Act with respect to the

High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

SS. 46, 47.

 POWERS OF
THE COURT.

As to the jurisdiction of the Chancery Courts of the Counties Palatine of Lancaster and Durham, see the Chancery of Lancaster Acts, 1850 to 1890 (13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82; and 53 & 54 Vict., c. 23); and the Palatine Court of Durham Act, 1889 (42 & 43 Vict. c. 47). The jurisdiction of their Common Law Courts was transferred to the High Court of Justice by the Judicature Act, 1873: see s. 16.

As to the jurisdiction of county courts, see the County Courts Act, 1888, s. 67 (5).

Compare T. A., 1850, s. 21. The Court of the Duchy Chamber of Lancaster mentioned in that s. is not a Palatine Court: see Blackstone's Commentaries, vol. iii. p. 78. The Court is not extinct, but its jurisdiction is seldom exercised: the jurisdiction given it by that s. appears still to exist.

PART IV.—MISCELLANEOUS AND SUPPLEMENTAL.

47.—(1.) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

 MISCELLA-
NEOUS AND
SUPPLEMEN-
TAL.

 Application to
trustees under
Settled Land
Acts of pro-
visions as to
appointment of
trustees.

(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict.
c. 41.

This s. replaces S. L. A., 1890, s. 17, repealed by this Act; but its operation is wider, inasmuch as the powers and provisions of this Act

SS. 47, 48, 49, relating to the appointment of new trustees, &c., are wider than those of the C. A. For instance, they cover powers given to the Court.

50.

MISCELLANEOUS AND SUPPLEMENTAL.

Trust estates not affected by trustee becoming a convict.
33 & 34 Vict. c. 23.

The repealed s. met the decision in *Re Wilcock*, 34 Ch. D. 508.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

See T. A., 1850, ss. 46, 47; the Forfeiture Act, 1870; and *Re Levy & Debenture Corporation*, 38 Sol. J. 530: where it was held that the Forfeiture Act, 1870, did not apply to property vested in a convict as trustee or mortgagee.

Indemnity.

49. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same.

Compare T. A., 1850, ss. 20, 55; T. A., 1852, s. 7.

Definitions.

50. In this Act, unless the context otherwise requires—

The Interpretation Act, 1889, must be borne in mind, in construing this Act.

The expression “bankrupt” includes, in Ireland, insolvent:

The expression “contingent right,” as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

See also the note on s. 36, *supra*.

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land :

As to estates tail and copyholds, see ss. 32, 34, *supra*.

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description :

The expression "instrument" includes Act of Parliament :

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land :

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee :

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connection with the expression "into court" include the deposit or transfer of the same in or into court :

The expression "possessed" applies to receipt of income

S. 50.

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NEOUS AND
SUPPLEMEN-
TAL.

S. 50.
 —
 MISCELLA-
 NEOUS AND
 SUPPLEMEN-
 TAL.
 —

of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land :

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not :

The expression "rights" includes estates and interests :

The expression "securities" includes stocks, funds, and shares ; and so far as relates to payments into court has the same meaning as in the Court of Chancery (Funds) Act, 1872 :

35 & 36 Vict.
 c. 44.

This definition is new : but it does not affect the construction of s. 35, in which the word is not used. It affects s. 42, however.

The expression "stock" includes fully paid-up shares ; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein :

"Stock."

"Stock," in T. A., 1850, included shares in a joint stock company (see *Re Angelo*, 5 De G. & Sm. 278), whether fully paid up or not (see that case, and *Re New Zealand Trust &c. Co.*, 1893, 1 Ch. 403, 410-1); and the definition here, so far as relates to vesting orders, seems wide enough to do the same: see also *Morrice v. Aylmer*, 10 Ch. 148.

"Any com-
 pany."

This cannot cover a foreign company outside her Majesty's dominions, or a company in Scotland: see s. 41, *supra*.

As to what is a foreign company, see *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *Huggin v. Comptoir D'Escompte de Paris*, 23 Q. B. D. 519, 522; *Russell v. Cambefort*, *ib.* 526, 528.

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee :

The expression "trust" does not include the duties

incident to an estate conveyed by way of mortgage ; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

SS. 50, 51, 52,
53, 54.

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NEOUS AND
SUPPLEMEN-
TAL.

For the cases of vesting orders where an infant is trustee with a beneficial interest, see note to s. 35 (ii.) (a), *suprà*.
As to an executor-trustee, see the cases cited on s. 25 (3), above.
Compare note to T. A., 1888, s. 1, pp. 187-8, *suprà*.

"Beneficial
interest."
Personal
representative.
"Implied and
Constructive
Trusts."
Repeal.

51. The Acts mentioned in the schedule of this Act are hereby repealed except as to Scotland to the extent mentioned in the third column of that schedule.

52. This Act does not extend to Scotland.

Extent of Act.

53. This Act may be cited as the Trustee Act, 1893.

Short title.

54. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Commence-
ment.

Section 51.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3. c. 52.	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101.	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32.	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96.	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict. c. 68.	An Act for extending to Ireland an Act passed in the last session of Parliament, entitled "An Act for better securing trust funds, and for the relief of trustees."	The whole Act.
12 & 13 Vict. c. 74.	An Act for the further relief of trustees.	The whole Act.
13 & 14 Vict. c. 60.	The Trustee Act, 1850.	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four and fifty-five; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
15 & 16 Vict. c. 55.	The Trustee Act, 1852.	Sections one to five, eight, and nine; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict. c. 82.	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91.	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60.	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty and thirty-one.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Section nine.
25 & 26 Vict. c. 108.	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
26 & 27 Vict. c. 73.	An Act to give further facilities to the holders of Indian stock.	Section four.
27 & 28 Vict. c. 114.	The Improvement of Land Act, 1864.	Section sixty so far as it relates to trustees; and section sixty-one.
28 & 29 Vict. c. 78.	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40.	The Partition Act, 1868.	Section seven.
33 & 34 Vict. c. 71.	The National Debt Act, 1870.	Section twenty-nine.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
34 & 35 Vict. c. 27.	The Debenture Stock Act, 1871.	The whole Act.
37 & 38 Vict. c. 78.	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83.	The Local Loans Act, 1875.	Sections twenty-one and twenty-seven.
40 & 41 Vict. c. 59.	The Colonial Stock Act, 1877.	Section twelve.
43 & 44 Vict. c. 8.	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41.	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39.	The Conveyancing Act, 1882.	Section five.
46 & 47 Vict. c. 52.	The Bankruptcy Act, 1883.	Section one hundred and forty-seven.
51 & 52 Vict. c. 59.	The Trustee Act, 1888.	The whole Act, except sections one and eight.
52 & 53 Vict. c. 32.	The Trust Investment Act, 1889.	The whole Act, except sections one and seven.
52 & 53 Vict. c. 47.	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5.	The Lunacy Act, 1890.	Section one hundred and forty.
53 & 54 Vict. c. 69.	The Settled Land Act, 1890.	Section seventeen.
55 & 56 Vict. c. 13.	The Conveyancing and Law of Property Act, 1892.	Section six.

CHAPTER IV.

THE TRUSTEE ACT (1893) AMENDMENT ACT, 1894.

57 VICT. c. 10.

An Act to amend the Trustee Act, 1893.

[18th June, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In section thirty of the Trustee Act, 1893, the words "as heir, or under the will of a deceased person, for payment of whose debts the judgment was given or order made" shall be repealed.

Amendment of
56 & 57 Vict.
c. 53, s. 30.

See note to T. A., s. 30.

2. The powers conferred on the High Court in England by section forty-one of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

Extension to
Ireland of
56 & 57 Vict.
c. 53, s. 41.

3. In section forty-four of the Trustee Act, 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person."

Amendment of
56 & 57 Vict.
c. 53, s. 44.

See note to T. A., s. 44.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment

Liability of
trustee in case
of change of
character of
investment.

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which has ceased to be an investment authorized by the instrument of trust or by the general law.

As to the law independently of this s., see *Re Medland*, 41 Ch. D. 476; and consider *Re Tucker*, 1894, 1 Ch. 724; *Re Irwin*, 39 Sol. J. 233.

Short title.

5. This Act may be cited as the Trustee Act (1893) Amendment Act, 1894.

PART IV.

CHAPTER I.

SUMMARY OF THE MARRIED WOMEN'S PROPERTY ACTS, 1882 & 1893.

THE general result of these Acts as regards the form and effect of documents is as follows :—

- (1.) As to disposal of property or things in action
 - (a) Every woman married after 1882, and
 - (b) Every woman married before 1883, as regards property and things in action acquired after 1882,

Married woman's power of disposition.

can convey as if she were a feme sole, and the concurrence of her husband in any disposition is not necessary.

(2.) A trust for the separate use of a married woman appears no longer necessary. A simple restraint on anticipation, where desired, is effectual (s. 19), even in case of a settlement made by herself of her own property.

Separate use.

The decision in *Re Price*, 28 Ch. D. 709, which made it advisable, for the purpose of giving a married woman full powers of testamentary disposition, still to express gifts to be "for her separate use," has been set aside by s. 3 of the M. W. P. A., 1893.

It may be questioned whether a married woman can alone be protector in respect of a life estate which is her separate property under this Act, but is not expressly *by the settlement* settled to her separate use: see *Fines & Recoveries Act*, s. 24; and compare *Re Smith's Estate*, 35 Ch. D. 589; *Re Drummond & Davie*, 41 Ch. D. 524.

Married woman "protector of settlement."

- (3.) Acknowledgment of deeds is only necessary where

Acknowledgment.

the property was acquired and the woman was also married before 1883, in which case the mode of acknowledgment is now simplified by C. A., 1882, s. 7.

Executrix or trustee.

(4.) A married woman can be made an executrix or trustee without any inconvenient consequences as regards mode of dealing with the property.

Power of appointment not necessary.

(5.) It is no longer necessary to give a married woman a power of appointment in order to enable her to dispose of property either by deed or will.

Covenant to settle future property.

(6.) In settlements it is sufficient that she alone covenants to settle her future property. According to the decisions on s. 19 it seems that the covenant of the husband alone still has effect as before the Act to bind the wife's property though made her separate property under the Act. Where the wife is an infant at the time of marriage, her covenant remains in force if she dies without having done any act to avoid it: *Burnaby v. Equitable Rev. Int. Soc.*, 28 Ch. D. 416. On attaining twenty-one, and though still under coverture, she can by deed effectually ratify it (*Re Hodson*, 1894, 2 Ch. 421); and she may be put to her election to confirm the settlement or take nothing under it unless she is restrained from anticipation: *Willoughby v. Middleton*, 2 J. & H. 344; *Smith v. Lucas*, 18 Ch. D. 531; *Re Vardon's Trusts*, 31 Ch. D. 275.

Where wife an infant.

Post-nuptial settlement by married woman.

(7.) A covenant by a married woman will no longer be void, but a covenant by her to settle, and also a settlement by her of real or personal estate, will, unless a consideration is given, be voluntary and liable to all the incidents of a voluntary covenant or settlement. The principle of *Teasdale v. Braithwaite*, 4 Ch. D. 85, 5 *ib.* 630, and *Re Foster and Lister*, 6 Ch. D. 87, no longer applies.

(8.) Except that a woman in settling her property has the power, which a man has not, to restrain herself from anticipation during coverture, all settlements by women are now placed on the same footing as settlements by men (s. 19).

Separation deeds.

(9.) It is conceived that a wife can now contract with

her husband for purposes of a separation deed, and that the concurrence of a trustee is unnecessary to support it as a settlement for value: *McGregor v. McGregor*, 21 Q. B. D. 424. For the effect of such a contract on her power to pledge her husband's credit for her necessities, see *Eastland v. Burchell*, 3 Q. B. D. 432; *Wilson v. Glossop*, 20 *ib.* 354.

(10.) It seems that a document sealed and delivered by a married woman is now her deed at common law, and not merely a writing sealed and delivered, she being for all purposes of property and contract a feme sole; but the Act does not expressly say so.

Deeds ¹
generally.

(11.) The Act seems to render obsolete as to women married after 1882 all the cases as to fraud on the husband's marital rights (but see Pollock on Contracts, 3rd ed., p. 266), and also, as regards property devolving after 1882 on any married woman, all the cases as to reduction in possession, and as to her equity to a settlement.

Equity to
settlement.

(12.) It is conceived that under a gift after 1882 to husband and wife in terms which would make them joint tenants if they were not married, they will no longer take as one person or hold by entireties, but take as joint tenants in the same manner as two unmarried persons: see *Thornley v. Thornley*, 1893, 2 Ch. 229. So under a limitation to husband and wife and the heirs of their bodies they will take as tenants in common in tail: see *Fearne*, C. R. 39, 40. But husband and wife still take only one moiety where there is a gift to them and a third person, without any indication of an intention to displace the technical rule: see *Re Jupp*, *Jupp v. Buckwell*, 39 Ch. D. 148; *Re March*, *Mander v. Harris*, 27 Ch. D. 166; *Re Dixon*, 42 Ch. D. 306.

Joint tenancy.

(13.) The Act contains no express provision as to whether a husband married after 1882, or a husband married before 1883 in respect to property acquired after 1882, will, in the absence of any disposition by the wife during her life or by will, become absolutely entitled in his marital right to the wife's personal estate

Husband's
right to
personalty of
wife intestate.

Preserved by
Statute of
Frauds, s. 25.

Wife not *feme
sole* under Act
of 1870.

Estate by
curtesy.

The wife's
term and
chattels.

on taking out letters of administration, or will become tenant by the curtesy. Under the old law equity only interfered just so far as was necessary to give effect to the separate use. By the death of the wife without making any disposition, the separate use was exhausted, and all the husband's rights remained as if it had never existed: see *Cooper v. Macdonald*, 7 Ch. D. 296, per Jessel, M.R. Now (see M. W. P. A., s. 1) the wife takes as a *feme sole*, and is a separate individual: the husband takes nothing in his marital right during the coverture. As regards personal estate, s. 25 of the Statute of Frauds (29 Ch. ii. c. 3) gave to the husband beneficially the personal estate of his wife dying intestate, as well as the right to take out letters of administration, and still remains operative: *Re Lambert, Stanton v. Lambert*, 39 Ch. D. 626; and see *Smart v. Tranter*, 43 Ch. D. 587; *Surman v. Wharton*, 1891, 1 Q. B. 491. No such question arose on the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), which does not use the words "*feme sole*," but only the ordinary expressions "*separate use*" (see ss. 1, 3, 4, 5, 7, 8, 10, 12) and "*separate property*" (see ss. 2-5, 9, 11, 13, 14), not interfering therefore with the husband's marital rights further than is done by the same expressions used in a settlement or will.

(14.) The estate by the curtesy was an extension during the husband's whole life (arising on birth of inheritable issue) of his freehold in right of his wife during the joint lives (*Burton, Real Prop.*, 145-6), where the estate of the wife was an inheritance in possession: *Fearne, C. R.* 341-2. The estate by the curtesy still exists (see *Hope v. Hope*, 1892, 2 Ch. 336); but it is conceived that it is wholly changed in its nature. The husband has no present freehold in his wife's right, nor can he have any remainder, there being no particular estate. He must take by *quasi* descent in the same manner as the heir.

(15.) The wife's term of years in land, and her chattels passing by delivery, acquired after 1882, no longer vest

legally in the husband, nor are they capable of being assigned by him. He must now, it seems (but see *Hope v. Hope, ubi sup.*) take out letters of administration to complete his title on her death: *Surman v. Wharton*, 1891, 1 Q. B. 491, is no authority to the contrary, for there the marriage took place, and the property was the wife's, before 1883.

(16.) Also marriage is no longer a severance of the wife's joint-tenancy in chattels passing by delivery (see *Wms. Pers. P.* 409, 9th ed.; *Re Butler's Trusts*, 38 Ch. D. 286).

Wife's joint tenancy in chattels.

(17.) Under the Statutes of Limitation there is no longer in regard to property acquired after 1882 any saving in favour of a wife on account of the disability of coverture. She is free to sue.

Coverture now no disability.

(18.) The Act does not enable a donor to make a conveyance or devise to husband and wife which will put them in the same position as before the Act; but see *Tasker v. Tasker & Lowe*, 1895, P. 1, as to paraphernalia. Every married woman coming within the terms of the Act appears now to be made a completely distinct person from her husband for all purposes connected with *her own* property. The Act does not affect her right to dower or freebench, or under the Statutes of Distribution, in respect to her husband's property.

Wife divorced for purposes! of her own property.

(19.) The Act affords no assistance in the disposition by a woman married before 1883 of property acquired by her before that year. She can still only dispose by acknowledged deed (under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, as amended by C. A., 1882, s. 7) of land or an interest in land or money liable to be laid out in land. She can also, under 20 & 21 Vict. c. 57, dispose of a reversionary interest in personal estate acquired under an instrument dated after 1857, and not derived under her marriage settlement. The latter Act only applies to a reversionary interest in personal estate, and did not make it clear that either she or her husband separately or together could assign a simple *chose in action*, for instance, a debt or a policy of assurance effected in

Disability of women married before 1883.

Whether 20 & 21 Vict. c. 57, is applicable to *chooses in action*.

her name, as distinguished from an equitable *chose in action*, such as a legacy or other money held in trust for her, which would come under the description of personal estate: see *Re Jenkinson*, 24 Beav. 64, at p. 73; *Fryer v. Morland*, 3 Ch. D. 675, at pp. 685, 686. But Chitty, J., has decided that the Act applies to a policy of assurance: see *Witherby v. Rackham*, W. N., 1891, 57.

Widow's right
on intestacy,
and no issue.

Under the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29), where a man dies intestate after 1st September, 1890, *leaving no issue*, his widow takes his whole real and personal estate if not exceeding in net value £500, or if exceeding in net value that sum she takes a charge for £500 with interest at 4 per cent. from his death and also takes the same share and interest in the residue as if it had been the whole real and personal estate and the Act had not been passed.

Exemption of
wife's income
from Income
Tax.

As to exemption from Income Tax, of profits, from certain sources, of wife living with her husband, see Finance Act, 1894, s. 34 (2).

CHAPTER II.

MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act, 1870":

S. 1.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

This Act is retrospective as to procedure: *James v. Barraud*, 31 W. R. 786; *Gloucestershire Bg. Co. v. Phillipps*, 12 Q. B. D. 536.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

Married woman to be capable of holding property and of contracting as a *feme sole*.

The whole effect of this s. appears to be contained in the words "feme sole" and "without the intervention of a trustee": see *Re Cuno*, 43 Ch. D. 12, 16; *Hope v. Hope*, 1892, 2 Ch. 336, 341-2. Before the Act it was competent for a married woman to "acquire, hold, and dispose of" property, but she was not entirely in the same position as a *feme sole*, and the intervention of a trustee was necessary to

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S. 1.

prevent the legal estate or right vesting in her husband, and to enable it to pass without an acknowledged deed. The words "separate property" seem equivalent to "property belonging to her for her separate use": see *Re Bowen*, 1892, 2 Ch. 291. This suba., taken by itself, is merely enabling; it does not say whether, in order to enable a married woman to take separate property it must be expressly given to her as such, in the same manner as formerly in case of property given for her separate use. This, however, appears provided for by s. 2 as to a woman married after 1882, and by s. 5 as to a woman married before 1883, in respect to property acquired after 1882. Under these ss. she is "entitled to have and to hold, and to dispose of in manner aforesaid, as her separate property," so that an absolute separate title is thereby created, and it seems quite independent of the terms of gift, so that it is not now legally possible to create the old status as to property between husband and wife.

As to the force of the words "in accordance with the provisions of this Act," see *Re Cuno, ubi sup.*; *Re Harris' S. E.*, 28 Ch. D. 171.

Applies only
to property
acquired
during
coverture.

Pearson, J., held that the s. is confined in its operation to property acquired during the coverture, and consequently a will made or republished during widowhood is necessary in order to dispose of property acquired during widowhood: *Re Price, Stafford v. Stafford*, 28 Ch. D. 709; but see now *M. W. P. A.*, 1893, s. 3.

But a will made before this Act by a married woman dying during the coverture would pass separate property acquired under this Act: *Re Bowen*, 1892, 2 Ch. 291.

Release of
power not
necessary.

Where property was held in trust for a widow for life for her separate use and after her death for such persons as she should during coverture by will, and when discover by deed or will appoint, and in default, for her absolutely, so that before her second marriage she was entitled to have it transferred to her absolutely,—it was held that she remained so entitled after her second marriage subsequently to the Act: *Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622; and see *Re Davenport*, 1895, 1 Ch. 361.

Notwithstanding this Act, a married woman cannot make a valid gift by will under a statute enabling gifts by will for certain purposes (as the Church Building Act, 43 Geo. 3, c. 108), but not extending to "women covert without their husbands": *Re Smith, Clements v. Ward*, 35 Ch. D. 589.

General power.

As to the exercise by a married woman of a general power of appointment by will, see s. 4, *post*, and n.

Release or
disclaimer of
power.

And it seems doubtful if this Act anywhere enables a married woman to release or disclaim a power under C. A., 1881, s. 52, and C. A., 1882, s. 6, when the power is not coupled with an interest. See those ss., and *Re Davenport, ubi sup.*; and on the distinction between "power" and "property": *Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521; *Re Roper*, 39 Ch. D. 482.

Trust
property.

Though, as will be subsequently shown, the wording of s. 18 is rather deficient, it seems reasonably clear that this subs. and ss. 2 and

5 include all trust property. The words are in strictness only applicable to property of which she is beneficial owner, but as she is liable separately on contract or in tort, and her husband need not be a party to any action (subs. 2), the same reasoning applies as in *Bathe v. Bank of England*, 4 K. & J. 564.

S. 1.

But where husband and wife come together, to an inn with luggage, the innkeeper's lien attaches on the wife's luggage being her separate property even where the husband alone is liable for the bill: *Gordon v. Silber*, 25 Q. B. D. 491.

Innkeeper's lien.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

See also M. W. P. A., 1893, s. 1.

As to "contracts" under this subs., and their nature, see *Scott v. Morley*, 20 Q. B. D. 120; *Holtby v. Hodgson*, 24 *ib.* 103; *Jay v. Robinson*, 25 *ib.* 467; *Whittaker v. Kershaw*, 45 Ch. D. 320. A married woman can make a joint contract, and judgment recovered against the co-contractor bars an action against her: *Hoare v. Niblett*, 1891, 1 Q. B. 781.

"Contract."

Under this subs. a married woman may sue alone for a tort committed before the commencement of the Act (*Weldon v. Winslow*, 13 Q. B. D. 784; *Lowe v. Fox*, 15 *ib.* 667), and for a trespass on a house occupied by her (*Weldon v. De Bathe*, 14 Q. B. D. 339), and she may petition alone (*Re Outwin's Trusts*, 31 W. R. 374; but see *Re Smith's Estate*, 35 Ch. D. 589, 596), and is not liable to give security for costs: *Threlfall v. Wilson*, 8 P. D. 18; *Severance v. Civil Service Supply Association*, 48 L. T. 485; *Re Isaac, Jacob v. Isaac*, 30 Ch. D. 418; *Re Thompson*, 38 Ch. D. 317, 318; see, however, *Re Robinson, Pindar v. Robinson*, W. N., 1885, 147; *Weldhen v. Scattergood*, W. N., 1887, 69, which seem in direct conflict with the cases previously quoted.

Married woman may sue and petition alone.

Security for costs.

And for purposes of an injunction, her undertaking as to damages is sufficient: *Re Prynne*, W. N., 1885, 144; *Pike v. Cave*, W. N., 1893, 91.

Undertaking as to damages.

But where she appeals, having no separate property, and without a

Security for costs of appeal.

S. 1.

Suing by next friend.

next friend, she may be ordered to give security for costs of the appeal: *Whittaker v. Kershaw*, 44 Ch. D. 296.

And where, instead of suing alone, she sues by a next friend who is not a responsible person, security for costs may be required: *Re Thompson, ubi sup.*

Cannot be next friend, &c.
Husband liable for torts.
Liability for money lent by husband.

It would seem, from the last cited case, that a married woman who, after the M. W. P. A., institutes proceedings by a next friend, cannot proceed without one, the next friend being alone liable for costs. But query if this be so where proceedings have, before the Act, been instituted by her by a next friend. She cannot act as next friend or guardian *ad litem* (*Re Duke of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465); and her husband is still liable for her torts (*Seroka v. Kattenburg*, 17 Q. B. D. 177); and he may recover from her separate estate money lent to her or paid by her direction after, but not before, marriage: *Butler v. Butler*, 14 Q. B. D. 831; 16 *ib.* 374.

And as to the wife's right to damages for personal injuries to her, recovered in an action in which she and her husband are co-plaintiffs, see *Beasley v. Roney*, 1891, 1 Q. B. 509, and s. 5, *infra*.

Must have property at date of contract.

Before the M. W. P. A., 1883 (which, however (s. 1), only applies to contracts entered into after the passing of the Act), it was necessary, in order that a married woman should be liable under this sub., that she should have had separate property at the time of the contract (*Re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169; *Palliser v. Gurney*, 19 Q. B. D. 519; *Stogdon v. Lee*, 1891, 1 Q. B. 661), and not have been restrained from anticipation (see s. 19, *infra*; *Draycott v. Harrison*, 17 Q. B. D. 147), and where she was so restrained a judgment against her on a promissory note made after the Act had no effect (*Beckett v. Tasker*, 19 Q. B. D. 7; *Smith v. Whitlock*, 55 L. J. Q. B. D. 286); but arrears or savings of an income which she could not anticipate, would do: *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328; *Butler v. Cumpston*, 7 Eq. 16; *Cox v. Bennett*, 1891, 1 Ch. 617: see, however, *Hood-Barrs v. Cathcart*, 1894, 2 Q. B. 559, 570; *Pillers v. Edwards*, 39 Sol. J. 96.

Restraint on anticipation.

As to the effect of the words "in tort or otherwise," see *Whittaker v. Kershaw*, 45 Ch. D. 320.

Form of judgment.

For a form of judgment under this Act, see *Scott v. Morley*, 20 Q. B. D. 120; *Downe v. Fletcher*, 21 *ib.* 11; see also *Bursill v. Tanner*, 13 *ib.* 691; *Nicholls v. Morgan*, 16 L. R. Ir. 409.

Judgment under R. S. C., 1883, Or. xvi., r. 52, may be ordered against a married woman, third party, as a *feme sole*, charging her separate estate even in respect of a liability incurred before the Act: *Gloucestershire Bg. Co. v. Phillipps*, 12 Q. B. D. 533.

A judgment against a married woman may be the foundation of a garnishee order: *Holtby v. Hodgson*, 24 Q. B. D. 103.

And an order against her to pay costs can be enforced against arrears, accrued since the institution of the proceedings, but before the order, of income which she is restrained from anticipating (see *Cox v. Bennett*, 1891, 1 Ch. 617, distinguishing *Re Glanvill*, 31 Ch. D. 532; see also *Hyde v. Hyde*, 13 P. D. 166; *Michell v. Michell*, 1891, P. 208);

but an ordinary judgment cannot, it seems, be enforced by any kind of order or process against arrears of such income accrued subsequently to the judgment (*Hood-Barrs v. Cathcart*, *ubi sup.*); nor, it seems, can any contract, judgment, or order bind, under this *a.*, any arrears of such income, even though due and payable, before they have actually come to her hands: see that case, at p. 570; and *Pillers v. Edwards*, *ubi sup.*

S. 1.

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.*

This subs. is repealed by M. W. P. A., 1893, s. 4. It was not retrospective: *Conolan v. Leyland*, 27 Ch. D. 632.

Not retrospective.

The contrary was shown, if she had no property but what she could not anticipate (*Harrison v. Harrison*, 13 P. D. 180); or but that and her own and her children's clothes: *Leak v. Driffeld*, 24 Q. B. D. 98.

"Contrary shown."

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.*

This subs. is also repealed by the M. W. P. A., 1893, s. 3. It was not retrospective: *Conolan v. Leyland*, 27 Ch. D. 632; *Turnbull v. Forman*, 15 Q. B. D. 234; *Re Roper*, *Roper v. Doncaster*, 39 Ch. D. 482. It renders obsolete (see *Cox v. Bennett*, 1891, 1 Ch. 617, 622-3) the decision in *Pike v. Fitzgibbon*, 17 Ch. D. 454, that the contract of a married woman bound so much only of her separate estate not subject to restraint on anticipation as existed at the date of the contract, and remained when judgment was enforced.

As to the definition of "contract," see s. 24.

"Thereafter," *i.e.* during the coverture (*Beckett v. Tasker*, 19 Q. B. D. 7); but so that income, which she cannot anticipate, is not bound: see *Hood-Barrs v. Cathcart*, 1894, 2 Q. B. 559.

The M. W. P. A., 1893, applies only to contracts entered into after the passing of the Act, and it repeals the two preceding subs. absolutely. But their effect as to acts done under them is preserved: see Interpretation Act, 1889, s. 38 (2), (b) and (c).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

SS. 1, 2, 3.

Married
woman not
trading.

It is conceived that this subs. is not restrictive, and that a married woman who does not carry on a trade, is, as a *feme sole* in respect to her property, subject to the bankruptcy law in the same way as any other non-trader: but see *Esher, M.R., in Holby v. Hodgson*, 24 Q. B. D. 105, 106.

A married woman cannot, however, be made bankrupt under a bankruptcy notice on a judgment in the form in *Scott v. Morley* (see *Re Lynes*, 1893, 2 Q. B. 113); nor can a widow: *Re Hewett*, 1895, 1 Q. B. 328.

A married woman carrying on trade in partnership with her husband does not carry on trade separately from him: *Re Helsby*, W. N., 1893, 189. *AGL*:

Married
woman's
general power.

A married woman on becoming bankrupt cannot be required to exercise in favour of the trustee in bankruptcy a general power of appointment (*Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521), but her life interest settled to her separate use without any restraint on anticipation passes to the trustee notwithstanding s. 19: *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264.

As to what constitutes separate business, see *Re Dearmer, James v. Dearmer*, W. N., 1885, 212; *Lovell v. Newton*, 4 C. P. D. 7; *Smith v. Hancock*, 1894, 2 Ch. 377.

Property of a
woman married
after the Act
to be held by
her as a *feme
sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Fines and
Recoveries Act.

Accordingly the examination of a woman married since 1882, as to her consent under S. E. A., s. 50, is not necessary: *Riddell v. Errington*, 26 Ch. D. 220; *Re Robinson's S. E.*, 38 Sol. J. 325 (but see *Re Smith's Estate*, 35 Ch. D. 589, 596). And in the case of a deed executed by her under s. 40 of the Fines and Recoveries Act, the husband's concurrence and acknowledgment by her are not required: see *Re Drummond and Davie*, 1891, 1 Ch. 524.

As to a married woman's exemption from Income Tax, see Finance Act, 1894, s. 34 (2).

Loans by wife
to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any

trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

This s. applies unless it is shown that money was not lent to the husband for the purpose of his business (*Re Genese, Ex parte District B. of London*, 16 Q. B. D. 700; *Ex parte Tidswell, Re Tidswell*, 35 W. R. 669; *Alexander v. Barnhill*, 21 L. R. Ir. 511; *Mackintosh v. Pogose*, 1895, 1 Ch. 505); but if lent to a trading partnership of which the husband is a member, the wife, so far as respects the joint estate, is not postponed to other creditors: *Re Tuff, Ex parte Nottingham*, 19 Q. B. D. 88. To what debts, &c., applicable.

It is conceived that this s. leaves the wife free to enforce any security she takes from her husband for the loan: compare *Ex parte Sheil*, 4 Ch. D. 789; *Badeley v. Consolidated Bank*, 34 Ch. D. 536; 38 *ib.* 238.

This s. is not retrospective: *Re Home, Ex parte Home*, 54 L. T. 301.

This s. does not apply where a widow, administratrix—there being no bankruptcy—exercised her right of retainer: *In re May*, 45 Ch. D. 499, following *Lee v. Nuttall*, 12 Ch. D. 61. For its application in postponing the claim of a widow (who had no right of retainer), in an administration action, the costs of which left not enough assets to pay the testator's other creditors in full, see *Re Long*, 39 Sol. J. 329. 1871. 1. 1. 652

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act. Execution of general power

This s. applies only to contracts made after its commencement (*Re Roper, Roper v. Doncaster*, 39 Ch. D. 482); but it applies to them, whether the married woman had separate property at their date, or not: *Re Ann*, 1894, 1 Ch. 549. As to the law apart from the Act, see those cases and *Pike v. Fitzgibbon*, 17 Ch. D. at p. 466: and *Re Parkin*, 1892, 3 Ch. 510 (as to ante-nuptial contracts). To what liabilities this s. applies.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

SS. 5, 6.

vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

When title
must accrue.

The date when the title, whether vested or contingent, was acquired to any property, and not the date when it falls into possession, governs the application of the Act (*Reid v. Reid*, 31 Ch. D. 402; *Re Dixon*, 35 ib. 4); but a mere "spes successionis" is no title: *Re Parsons*, 45 Ch. D. 51.

"Spes
successionis."

Under an exercise of a special power, title accrues when the power is exercised, not when it is created: *Re Crawshaw*, 1891, 3 Ch. 176, 180; *Sweetapple v. Horlock*, 11 Ch. D. 745; *Re Butler's Trusts*, 1. R. 3 Eq. 138.

A will, made before the Act, by a married woman, will, independently of s. 3 of the M. W. P. A., 1893, pass separate property accruing to her under this s.: *Re Bowen*, 1892, 2 Ch. 291.

This s. includes money recovered by the verdict of a jury: *Beasley v. Roney*, 1891, 1 Q. B. 409.

As to stock,
&c., to which
a married
woman is
entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married

woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

SS. 6, 7.

This s. applies to funds in the sole name of a married woman at the commencement of the Act, although "name," and not "sole name," occurs in the 14th line. The next s. applies to those subsequently transferred to her sole name. The words "beneficially entitled" appear to exclude the case of trust property, which, however, seems supplied by s. 18.

This s. uses the old expressions "separate property of a married woman," and "separate use," but nothing seems to arise thereon. The words "separate use" and "separate property of a married woman" seem to be used as equivalent expressions: see first note to s. 1 (1) of this Act.

As to the law under the M. W. P. A., 1870, see that Act, ss. 3-5, and *Howard v. Bank of England*, 19 Eq. 275.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby

As to stock, &c., to be transferred, &c., to a married woman.

SS. 7, 8.

her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

This s. does not contain the words "beneficially entitled," and appears, therefore, to include trust property: see note to last s.

Investments in
joint names of
married
women and
others.

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

This s. appears not to include trust property standing in the names of a married woman jointly with any persons or person other than her husband, at the commencement of the Act, but does include trust property subsequently transferred to her jointly with any persons or person other than her husband: see notes to last two ss.

As to the law before this Act, see note to s. 6, *suprà*.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

SS, 9, 10, 11.

As to stock, &c., standing in the joint names of a married woman and others.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Fraudulent investments with money of husband.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

Moneys payable under policy of assurance not to form part of estate of the insured.

S. 11.

13 & 14 Vict.,
c. 60.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

The following points seem to arise on this s., and may, it is conceived, be answered or explained as follows:—

1. A policy effected by a married woman remains her separate property if the objects in whose favour it is effected fail, and can be disposed of by her as a *feme sole* (see ss. 1, 24): see *Cleaver v. Mutual Reserve Fund Life Association*, 1892, 1 Q. B. 147.

2. If the policy is effected by a man for the benefit of his wife and children, or by a woman for the benefit of her husband and children, the beneficiaries acquire, at the time or in the event specified in the policy, vested interests in like manner as in case of an ordinary policy effected and assigned to trustees on trust. If the wife or husband is to take a life interest only, it should be so expressed: if there be no direction to the contrary, the wife and children take as joint tenants: see *Re Seyton*, 34 Ch. D. 511, dissenting from *Re Adam*, 23 Ch. D. 529; *Re Davies' Policy Trusts*, 1892, 1 Ch. 90, following *Re Seyton*. If the policy is effected by a man or his wife for the benefit of the other alone it should be expressed that that other shall take only in case of surviving, as otherwise there will be an immediate right to dispose of it.

3. The power to effect a policy is not, it seems, as in the Act of 1870, confined to a married man or woman. An unmarried man or woman may under this s. effect a policy for any future wife or husband and children.

4. Children only and not issue generally are within the s.

5. The policy under this s. is in effect a complete settlement of personality incapable of being defeated by the person making it though there be no wife or children yet in existence. Nor can the insured surrender the policy; but perhaps (there being no covenant to keep up the policy) it might be exchanged for a policy for a smaller sum on the same life and free of premium, this being the only mode of preserving the policy if the premium cannot be paid.

6. In the absence of wife or husband or child capable of taking under the trusts, the policy is part of the estate of the insured, and would pass to his or her trustee in bankruptcy: see *Cleaver v. Mutual, &c., Association, ubi sup.* A general power to surrender should not be reserved. If it were reserved, or could be implied, it could be exercised by the trustee in bankruptcy and thus defeat the settlement. The only power reserved (if any) should be to apply bonuses in reduction of premiums, or to surrender in exchange for a policy of smaller amount at a reduced premium, or with all premiums paid up.

7. Though this s. does not, like the Act of 1870, say that wife and children are under the policy to take "according to the interest expressed," yet the trusts of the policy money may, it is conceived, be moulded in any way the insured desires for the benefit of wife and children.

8. The words "in default of notice to the insurance office" mean Notice. in default of notice of appointment of trustees of the policy money. But during the insured's life, where there are no trustees, notices of

S. 11.

Points arising on s. 11.

Policy effected by married woman.

When interests vest under.

How policy should be expressed.

Policies effected under this s. by unmarried persons.

Issue other than children not within this s.

Effect of this s. on policy, and its surrender.

- S. 11. — assignments and charges must, it is conceived, be given to the office, there being no one else to receive them, and the office must record and acknowledge them as in case of an ordinary policy. No other notice seems possible. Nevertheless the office may pay the money to the trustees thereof when appointed, or, if none, to the insured's personal representatives, but should in each case hand over copies of the notices.
- Stamp. 9. Assuming the policy to have no money value, no settlement stamp beyond the 10s. for a Declaration of Trust is payable, there being no provision made for keeping up the policy: see the Stamp Act, 1891, s. 104.
- In whom policy vests. 10. The s. does not expressly authorize the appointment of trustees of the policy, but only trustees of the money payable under the policy. If no trustee is appointed, the policy being in the name of the insured vests in him, which appears unavoidable, there being no provision in the Act vesting it in any other person.
11. If trustees are appointed it is not stated that the policy is to vest in them, but their receipts are made a discharge for the policy money; consequently under the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), they have a legal right to sue on the policy, if notice is given according to s. 3 of that Act, and this seems in effect to vest the policy in them in the same manner as an assignment on trust.
12. If the policy names trustees it does not seem necessary to the effectual appointment of such trustees that the insured should sign the policy, but he or she must sign any separate writing appointing trustees.
- General effect of this s. 13. Having regard to the other provisions of the Act, the effect of this s. seems to be only to render unnecessary a deed assigning the policy to trustees upon trust, and (see *Holt v. Everall*, 2 Ch. D. 273) to prevent the settlement from coming within s. 91 of the Bankruptcy Act, 1869, or s. 47 of the Bankruptcy Act, 1883: see s. 152 of that Act.
- Title of petition. Single trustee of policy not appointed. As to the title now of a petition for appointment of new trustees of a policy under M. W. P. A., 1870, see *Re Soutar*, 26 Ch. D. 236, where Pearson, J., seemed to think that s. 10 of the Act of 1870 is no longer in force, and he refused to appoint a single trustee though expressly authorized by that s.: *Re Howson*, W. N., 1885, 213.
- Exchange of policy. A policy effected under s. 10 of M. W. P. A., 1870, by a man on his own life for the benefit of his wife and children was authorized to be exchanged for another policy for a smaller sum, with premiums fully paid up, in *Schultze v. Schultze*, 56 L. J. Ch. 356.
- Endowment policies. It has been questioned whether this s. applies to an endowment policy creating a trust for wife and children, that is, a policy under which the money is payable not only on death, but also on surviving a certain age. Such a policy is an ordinary life policy with the benefit accelerated, and seems to come within the definition of a "policy effected by a man on his own life." It would at all events be good as

a voluntary settlement provided there is no bankruptcy within two years and the person effecting the policy is not insolvent at the date of the policy, otherwise it becomes good only after ten years: Bankruptcy Act, 1883, s. 47.

SS. 11, 12.

As to the legality and effect of a policy effected for purposes similar to those of this s., but not under the s., see *Re Davies*, 1892, 3 Ch. 63.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceedings shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Remedies of married woman for protection and security of separate property.

A married woman's debt against her husband is within the Statutes of Limitation: *Re Lady Hastings*, *Hallett v. Hastings*, 35 Ch. D. 94.

Married woman's simple contract debt against her husband.

An injunction may be granted on the application of a married woman on her sole undertaking as to consequential damages: *Re Prynn*, 53 L. T. 45; W. N., 1885, 144; *Pike v. Cave*, W. N., 1893, 91. And a husband is not debarred from proceeding against his wife under such an undertaking by the prohibition in this s. in regard to his wife's torts: *Hunt v. Hunt*, 54 L. J. Ch. 289; W. N., 1884, 243.

Injunction.

A married woman may not take criminal proceedings against her husband for a defamatory libel: *Reg. v. Lord Mayor of London*, 16 Q. B. D. 772.

Defamatory libel.

SS. 12, 13. As to this s. see *Reg. v. Brittleton*, 12 Q. B. D. 266, and *M. W. P. A.*, 1884.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sum for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Debt as devisee.

The debt of a married woman as devisee of land settled on her for life on her marriage, is a debt "contracted by her before marriage," and her life interest is liable, notwithstanding restraint on anticipation: *Re Hedgely, Small v. Hedgely*, 34 Ch. D. 379; and "before her marriage" means "before her existing marriage," not "any marriage": *Jay v. Robinson*, 25 Q. B. D. 467.

"Debts contracted" include her liabilities in respect of her separate property: *Jay v. Robinson*, *ubi sup.*

As to the liabilities of husband and wife under this and the two following ss., see *Beck v. Pierce*, 23 Q. B. D. 316.

Female contributory.

As to the liability, apart from these ss., of a man who marries a female contributory, see the Companies Act, 1862, s. 78; Buckley on the Companies Acts, 6th ed., pp. 78, 207.

"Liability in damages or otherwise," e.g. to specific performance, SS. 13, 14, 15. see *Smith v. Lucas*, 18 Ch. D. 531, 543.

As to her liability apart from the Act, see *Smith v. Lucas*; *Beck v. Pierce*, *ubi sup.*; *Re Parkin*, 1892, 3 Ch. 510; *Scott v. Morley*, 20 Q. B. D. 120, 123-4; *Robinson v. Lynes*, 1894, 2 Q. B. 577; *Chubb v. Stretch*, 9 Eq. 555; *Vanderheyden v. Mallory*, 1 Comstock (New York Appeals), 452.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property; Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

See as to a husband's liability apart from the Act: *Beck v. Pierce*, 23 Q. B. D. 316.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or

Suits for ante-nuptial liabilities.

SS. 15, 16, 17. liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

“Joint judgment”: as to the meaning of these words, see *Beck v. Pierce*, 23 Q. B. D. 316, 321.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Evidence in criminal cases.

Formerly (see *Reg. v. Brittleton*, 12 Q. B. D. 266) in criminal proceedings under this s. a husband's evidence could not be received against his wife: but see now the M.W. P. A., 1884, s. 1.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the Judge of the County Court of the district, or in Ireland to the chairman of the civil bill court of the division in which either

party resides, and the Judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a Judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit pending or on an equitable plaint in the said Court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the Judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

An inquiry was ordered under this s. in *Phillips v. Phillips*, 13 P. D. 220, and in *Tasker v. Tasker*, 1895, P. 1. The registrar of the

270 MARRIED WOMEN'S PROPERTY ACT, 1882.

SS. 17, 18, 19. P. D. has no jurisdiction to make an order under this s.: *Wood v. Wood & White*, 14 P. D. 157.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

This s. seems to cover in certain cases more than is necessary, and to be scarcely sufficient in others. So far as the preceding ss. apply to trust property, the express power to transfer the particular items of trust property here mentioned is not required, more especially as the married woman would not in most cases for the purposes of transfer be known to be a trustee. On the other hand, unless the preceding ss. do so apply, no provision is made for transfer of other kinds of trust property not mentioned in this s., as, for instance, land and choses in action: and see Lewin on Trusts, 8th ed., 36, and arguments in *Re Docwra*, 29 Ch. D. 693. The s. seems useful as an express provision that a married woman, as personal representative of a deceased person, may transfer funds standing in the name of the deceased, and also funds standing *at the commencement of the Act* in her sole name of which she is trustee, or in her name jointly with others as trustees, to which cases ss. 6 and 8 do not apply.

By s. 24 the husband of a trustee, executrix, or administratrix, is freed from all liabilities of the wife in those characters, unless he has intermeddled with the trust or administration.

An order for payment to a married woman as executrix should contain the words "on her separate receipt": *Re Hawksworth*, W. N., 1887, 113; Seton, 5th ed., p. 193.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income

by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before her marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered by a man would have against his creditors.

S. 19.

"Interfere with or affect": as to the meaning of these words, see *Re Armstrong*, 21 Q. B. D. 264; *Re Onslow*, 39 Ch. D. 622, 625.

"Debts contracted by her before marriage": see *Jay v. Robinson*, 25 Q. B. D. 467, cited on s. 13, *sup*.

The last clause in this s., taken in connection with s. 1 (5), places a settlement or agreement for a settlement by a married woman trading separately from her husband within the principle of *Ex parte Bolland*, L. R. 17 Eq. 115; and see *Axford v. Reid*, 22 Q. B. D. 548; *Jay v. Robinson*, *ubi sup*.

Settlement by married woman, a trader, when void against creditors.

This s. does not alter the construction of a settlement made before the Act. Thus a covenant therein by husband and wife, to settle all property of the wife except that given to her separate use, will still include property not given to her separate use, but to which under this Act she becomes entitled separately as a feme sole: *Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker, Christian v. Whitaker*, 34 Ch. D. 227. And the same construction has been put upon a covenant by the husband alone to settle (*Hancock v. Hancock*, 38 *ib*. 78), the principle stated being that if the fund would be bound by the covenant in case the Act had not passed then by force of this s. the fund remains bound notwithstanding the Act, so that in all cases where the fund can be reduced into possession during the coverture, the covenant of the husband binds and takes away from the wife separate property acquired by her under the Act.

Construction of settlement not altered.

Covenant to settle by husband alone.

The s. includes settlements "made or to be made," *i.e.* either before or after the Act (see *Re Johnson*, 1891, 3 Ch. 48, 53; *Stevens v. Trevor-Garrick*, 1893, 2 Ch. 307), and "whether before or after marriage." It is conceived that, as to future settlements, the s. was meant merely to leave them indisputably free to impose restrictions on any interest which a married woman might be given by them; but not to enable her separate property under the Act to be bound, in spite of the Act, by her husband, actual or intended, on the ground that, but for the Act, he would have had an interest to bind, and so could have made an effectual settlement of it. Otherwise, a husband can deprive his wife of her separate property

Settlements after the Act.

SS. 19, 20.

under the Act by merely executing a voluntary covenant to settle it, and, as the nature of the settlement is not specified, it would seem that he need not even settle it on his wife or issue. It was this absurd result which mainly led to the decision (which has been disapproved of in the cases above quoted) of Chitty, J., in *Queade's Trusts*, W. N., 1884, 225; 33 W. R. 816. There the wife was an infant at the time of the settlement and could not be considered in any way as an assenting party to the settlement, and it was held that her separate property under the Act was not bound. Upon the other construction s. 19 enables the husband to repeal s. 5 and take away all property given to his wife by the Act, and there is the further anomaly that though the husband is deprived of his old rights by the Act, yet the rights of persons who claim only through him are preserved. If the husband himself would have no title, how can his covenant confer a title on others, perhaps even on himself? The decision in *Queade's Trusts* seems a reasonable solution of the difficulty, namely, that s. 19 merely says the construction of the settlement is not to be affected and that the Act does not apply except where the wife is bound by, or has assented to, the settlement. But the decision in *Stevens v. Trevor-Garrick* goes beyond this. In the case of *Re Armstrong, Ex parte Boyd* (21 Q. B. D. 270), Lindley, L.J., said the words "interfere with or affect any settlement" mean "invalidate or render inoperative any settlement." It would seem therefore that there must be a settlement valid and operative against the wife in order to deprive her of her separate property under the Act.

As to the effect of this s. in preserving the restraint on anticipation, see *Hood-Barrs v. Cathcart*, 1894, 2 Q. B. 559.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall

31 & 32 Vict.
c. 122.

be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent. SS. 21, 22, 23.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married woman to be liable to the parish for the maintenance of her children.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act (1870) Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Repeal of 33 & 34 Vict. c. 93, 37 & 38 Vict. c. 50.

The effect of this s. seems to be to preserve the Act of 1870 as to all policies effected under it, and therefore an Insurance office must for its protection require the appointment of a trustee according to that Act and cannot safely pay to any other trustee or to the personal representative of the person whose life is assured, as provided by this Act: but see *Re Soutar*, 26 Ch. D. 236.

How far Act of 1870 preserved.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal representative of married woman.

In *Surman v. Wharton*, 1891, 1 Q. B. 491, it was held that a husband taking his intestate wife's leaseholds "jure mariti" and without letters of administration, was her "legal personal representative" within this s.

As to a husband's liability, *quâ* personal representative of his wife, for her ante-nuptial contracts, see *Re Parkin*, 1892, 3 Ch. 510.

SS. 24, 25, 26,
27.

Interpretation
of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Administration
bond.

It is not necessary now that the husband of a married woman should join in the administration bond on grant to her of letters of administration: *Re Ayres*, 8 P. D. 168.

Commence-
ment of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

As the M. W. P. A., 1884, relates solely to the giving of evidence in criminal matters, by husband and wife, it is not inserted.

CHAPTER III.

RULES AS TO PROBATE OF WILLS OF MARRIED WOMEN AND WILLS OF WIDOWS MADE DURING COVERTURE.

AMENDED RULES, ORDERS, and INSTRUCTIONS for the REGISTRARS of the PRINCIPAL PROBATE REGISTRY and for the DISTRICT PROBATE REGISTRARS, in NON-CONTENTIOUS BUSINESS. (29th March, 1887.)

Rule 15 of the Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry in non-contentious business, dated 30th July, 1862, and Rule 18 of the Rules, Orders, and Instructions for the District Probate Registrars in such business, dated the 27th January, 1863, are respectively repealed, save so far as concerns anything done or proceeding taken in accordance with them, and in place of the said Rules it is ordered that the following Rules shall take effect :—

Rules 15 and 18.—In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor, or other person authorized in usual course of representation to take the same ; a surviving husband, however, being entitled to the same in preference to the next-of-kin of the testatrix in case of a partial intestacy.

The forms of instruments annexed to the before-mentioned Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry, numbered 12, 13, and 14, and in the Rules, Orders, and Instructions for the District Probate Registrars, numbered 13, 14, and 15, and thereby directed to be adopted as nearly as the circumstances of the case will

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allow in respect of the wills of married women, shall cease to be adopted in respect of such wills, except so far as the same may be applicable to oaths sworn before these Rules and Orders take effect, and also except so far as the same may be applicable to any second or subsequent grants required to complete the representation in cases where limited or special grants have already issued.

Effect of new
probate rules.

As to the effect of the new rules, see *Smart v. Tranter*, 43 Ch. D. 587. They relate to mere matter of machinery, and do not affect beneficial interests. Where the wife has no power to dispose by will of property away from her husband, her executors are trustees of such property for him.

CHAPTER IV.

MARRIED WOMEN'S PROPERTY ACT, 1893. †

56 & 57 VICT. c. 63.

An Act to amend the Married Women's Property Act, 1882.

[5th December, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

S. 1.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

Effect of
contracts by
married
women.

(a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract ;

(b) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to ; and

(c) Shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to ;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

This s. does away with the rule laid down in *Palliser v. Gurney* and other cases cited in the notes on s. 1 (2) of the M. W. P. A., that, to be liable on a contract, a married woman must, at its date, have had separate property which she was not restrained from anticipating

Effect of s.

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SS. 2, 3, 4, 5,
6.

It replaces subs. (3) and (4) of that s. It also does away with the anomalous result of the decisions in *Jay v. Robinson*, 25 Q. B. D. 467, and *Pelton Brothers v. Harrison*, 1891, 2 Q. B. 422, that a liability incurred during one coverture could be enforced during a subsequent coverture, but not during the intermediate discovery.

As to the effect of the proviso, see *Hood-Barrs v. Cathcart*, 1894, 2 Q. B. 559.

Costs may be ordered to be paid out of property subject to restraint on anticipation.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just. *add.*

"Action or proceeding instituted."

This s. applies to an action or proceeding in the nature of an action, initiated by a married woman as plaintiff, and does not include steps taken by her in proceedings in which she is defendant: *Hood-Barrs v. Cathcart*, 1894, 3 Ch. 376; S. C., 39 Sol. J. 347; *Hollington v. Dear*, *ib.* 284.

It does not enable an order for costs, made before the Act came into operation, to be altered or varied, or a new order for the same costs to be made: *Re Lumley*, 1894; 3 Ch. 135, 144.

For the form of order under this s., see *Davies v. Treharris Brewery Co.*, W. N., 1894, 198; 39 Sol. J. 59.

Will of married woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

This s. does away with the effect of *Re Price*, 28 Ch. D. 709, cited in the notes to M. W. P. A., s. 1 (1). It applies to wills, made before the Act, of women dying after it; *Re Wylie*, 39 Sol. J. 396.

Repeal.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Short title.

5. This Act may be cited as the Married Women's Property Act, 1893.

Extent.

6. This Act shall not apply to Scotland.

PART V.

CHAPTER I.

THE SETTLED LAND ACTS, 1882 to 1890.

SUMMARY OF THE ACTS.

THE general purpose of the Settled Land Act, 1882, is to give to an owner for the time being, having a beneficial interest in land under a settlement, whether the subject of settlement be an estate in fee simple or a less estate, power to dispose of or deal with the land or the estate or interest therein which is settled, so as to turn it to the best account, in the same manner as if he were a prudent owner absolutely entitled to the subject-matter of the settlement, and having complete power of disposition; care being at the same time taken to preserve the *corpus* of the property for the benefit of the successors in title of the owner for the time being.

General purpose of Act of 1882.

Part I. of the Act provides that the Act is to commence after the expiration of the year 1882, and is not to apply to Scotland. Part II. gives a definition (extended by the S. L. A., 1890, s. 4) of the word "settlement," which is to include past as well as future settlements, and of the words "settled land." S. 2 includes not only the fee simple when the fee simple is the subject-matter of settlement, but any estate or interest in land which is the subject of a settlement: s. 2 (3).

Commencement.

The scheme of the Act is first to give all the necessary powers to a tenant for life under a settlement, tenancy for life being the most usual form of limited ownership, and then, by s. 58, the powers so given are extended to

Powers to whom given.

other forms of limited ownership which are generally considered to place a person in the position of a land-owner; ss. 60-62 provide for the special cases where the limited owner is an infant, a married woman, or a lunatic.

The powers of the Act are conferred on a tenant for life "beneficially entitled to possession" of the land: s. 2 (5); and "possession" includes receipt of income or rents and profits, so that a tenant's lease does not prevent a tenant for life from being in possession within the meaning of the Act: s. 2 (10) (i.). The Act (s. 63) contains separate provisions for the case of a tenant for life not entitled to rents and profits as such, but still entitled under a settlement by way of trust for sale to the income of the land until sold, as representing the income to be derived from the proceeds of sale. By the S. L. A., 1884, s. 7, an order of the Court is required to enable the exercise of the powers conferred by s. 63, and naming the person to exercise those powers. Until an order is made the trustees continue competent to sell under their trust.

The working of the Act rests entirely with the tenant for life. The trustees of the settlement for the purposes of the Act, except when acting for an incapacitated tenant for life, have no powers except to consent to sale of the mansion house (s. 15; repealed, and, with some alterations, re-enacted by S. L. A., 1890, s. 10), and are mere depositaries of money.

Resort to the Court.

Where resort to the Court is necessary, as must occasionally happen, the Court prescribed is the High Court of Justice (s. 2 (10) (ix.)), Chancery Division (s. 46), but jurisdiction is also given to County Courts (s. 46 (10)) in the case of land, money, investments, or chattels not exceeding £500 in capital value, or, in the case of land, not exceeding £30 in annual rateable value.

Nature of powers.

The powers conferred by the Act include all powers usually inserted in settlements of real estate, and also many additional special powers not generally found in settlements; but, unlike the powers usually conferred by

a settlement for dealing with the *corpus* of an estate, the powers conferred by the Act can in every case, except as to sale of the mansion house, to which a consent is required (S. L. A., 1890, s. 10), be exercised by the tenant for life, or other person in the same position as a tenant for life, at his own discretion, thus obviating the necessity for obtaining the concurrence or consent of trustees, which sometimes operates as a hindrance to the exercise of settlement powers. Where there is no competent person holding the position of a tenant for life, then the powers of the Act are exercisable by trustees, and it is always possible to obtain the appointment of trustees where there is any one interested in making an application to the Court for the purpose.

To secure preservation of the capital money arising on a sale or otherwise, the tenant for life has a choice (s. 22) to procure the money to be paid either to trustees or into Court; but neither these trustees nor the Court have any voice in the mode or terms of the sale; they are only called into action after the sale is effected, and then only for the purpose of acting as depositaries of the proceeds of sale until applied in a manner authorized by the Act. Where there are trustees of the settlement, or where trustees can be procured to act for the purpose of receiving capital money, or where there is no money to be received, as on a simple exchange or a lease, resort to the Court is not necessary. If there be trustees of the settlement who refuse to receive capital money, the Court can appoint other trustees for the purposes of the Act (s. 38), so that, unless specially desired, payment into Court of capital money can generally be avoided: but in every case, unless otherwise provided in the settlement, and except in cases of leases not exceeding twenty-one years (see S. L. A., 1890, s. 7), there must be at least two trustees, either appointed by the settlement or otherwise, or one trustee only if the settlement so permits, upon whom notice is to be served (s. 45), but the trustees may by writing under hand waive notice (S. L. A., 1884, s. 5 (3)). The existence of these two trustees, or a sole

Preservation
of capital.

trustee where permitted by the settlement (though they or he may be wholly passive), is necessary before the tenant for life can properly make any disposition (except such a lease) under the Act. As no trustee of the settlement incurs any personal responsibility, except for the safe custody, and in some cases the proper investment and application, of money which he actually receives (s. 42), there can in general be no difficulty in procuring persons to act.

Re-investment. The same principle applies to the application, on a re-investment or otherwise, of money in hand representing corpus. Where land is purchased or any other investment made, the trustees have no voice in making the purchase or investment. They are bound to pay the purchase-money or make the investment by direction of the tenant for life (s. 22 (2)), and are not in any way responsible for the propriety of the purchase or of any other investment, provided it appears to be within the terms of the Act or the settlement (s. 42). Where capital money is to be applied for improvements authorized by the Act, the application may be either on consent of the trustees or of the Court (s. 26), and where the consent of the trustees is required they are freed from responsibility by a certificate of the Land Commissioners (now the Board of Agriculture), or of a competent engineer or able practical surveyor, or by an order of the Court (s. 26 (2)), so that the responsibility of trustees is confined to seeing that any given transaction appears on the face of it to be a transaction authorized by the Act. They are free from all liability in respect to the propriety of the transaction, except where they approve a scheme for the execution of improvements under s. 26, on which, as a matter of course, they would obtain proper professional advice, and thereby practically free themselves from liability.

What powers given.

The particular powers conferred by the Act are as follows :—

Part III. of the Act, supplemented by S. L. A., 1890, ss. 5, 6, 10, 12, enables dispositions of land by Sale,

Enfranchisement, Exchange or Partition. Part IV., supplemented by S. L. A., 1889, S. L. A., 1890, ss. 7, 8, 9, enables the grant of various leases for agricultural, mining, and building purposes, of the kinds usually authorized by settlements, and also enables other grants in the nature of leases to be made with the consent of the Court. Part V., supplemented by S. L. A., 1890, ss. 10, 12, contains general provisions applicable to any of these modes of disposition and to the case of a settlement of an undivided share of land, but s. 10 of S. L. A., 1890, requires any sale, exchange, or lease of the principal mansion house and its pleasure grounds, and park, and lands to be made with the consent of the trustees of the settlement of the Court.

Part VI. provides for the application of capital money when the object is to re-invest it in land or securities (s. 21), and the application must be made by the direction of the tenant for life, or in the absence of such direction, by the trustees, subject to any consent required by the settlement (s. 22 (2)). The power to re-invest includes application in payment of incumbrances, redemption of land-tax and quit-rents, purchase of tithe rent-charge, and interim investment, and in the case of interim investment includes investments which trustees are authorized by law to make. Besides the modes of investment specified in the Act any other investment authorized by the settlement may be made (s. 21 (xi.)). An investment in land out of England or Wales cannot be made with money arising from sale of land in England or Wales unless expressly authorized by the settlement (s. 23).

Application of capital.

Part VII., taken with s. 21 (iii.), and S. L. A., 1890, s. 15, provides for the application of capital money in effecting improvements on the unsold portion of an estate. The list of improvements authorized is very large, and has been extended by S. L. A., 1890, s. 13, and the Housing of Working Classes Act, 1890, s. 74, (1), and seems to include all improvements more or less permanent (including the rebuilding—with a limit as to

Improvements.

cost—of a mansion house), which a prudent owner would wish to effect. By s. 30 the improvements to which the Improvement of Land Act, 1864, applies are extended so as to include all improvements mentioned in this Act, thereby enabling money to be borrowed under that Act, for all the improvements specified in this Act. The mode of procedure under the Act of 1864 is also simplified (s. 64 and schedule). Some kinds of improvement, as laying down to permanent pasture, were omitted on the ground that when made they would be liable to immediate re-conversion into income, but are now included by the Agricultural Holdings (England) Act, 1883. By s. 28 the tenant for life is put under an obligation to maintain and keep in repair improvements. There may sometimes be no one inclined to enforce the obligation, but the representative of the tenant for life would after his death be liable for the neglect.

Contracts.

Part VIII. enables the tenant for life by contract to bind his successor in respect to all dealings capable of being effected under the Act, so that where time is required to complete a transaction, as in case of an agreement to grant building leases, the person dealing with the tenant for life is made as safe by a mere contract as if he were dealing with an owner in fee simple.

Other capital money.

Part IX. contains provisions as to special cases of money representing capital, namely, money in Court (see also S. L. A., 1890, s. 14), or in the hands of trustees arising from dealings otherwise than under this Act; money arising from sales of reversions, or limited interests, or from sale of timber; money required for protection of the estate by legal proceedings; and money arising by sale of heirlooms, the sale of which is enabled by the Act (s. 37).

Duties, &c., of trustees.

Part X. deals with the duties and liabilities of trustees. The protection afforded to a trustee is very full. His only active duties are—to consent to a sale of a mansion house and its grounds (S. L. A., 1890, s. 10), to approve a scheme for improvements (s. 26), to receive or pay money, and by direction of the tenant for life (s. 22 (2))

to make interim or other investments. He is not bound to take proceedings in reference to any dealing of which notice is given to him. He is safe in acting as regards the execution of a scheme on a certificate of the Land Commissioners (now the Board of Agriculture), or of a competent engineer, or able practical surveyor, or on an order of the Court (s. 26 (2)); he is also safe in giving any consent or in omitting to do anything he might do, and in adopting any contract under the Act made by a tenant for life for purchase, enfranchisement, exchange, partition, or lease, and in accepting any conveyance which appears correct on the face of it, and in paying by direction of the tenant for life any money which appears to be paid in accordance with the Act (s. 42), or which, in the case of improvements, is authorized by the proper certificate or by order of Court. Under S. L. A., 1890, s. 12, on a sale to, or purchase by, the tenant for life or an exchange or partition with him, affecting settled land, the trustees take his place in carrying the transaction into effect.

Part XI. deals with procedure before the Court, to which applications may be made either by petition, or by summons, and the Court is enabled to direct payment of costs and expenses, and the raising of the amount out of the settled land. Procedure.

The general effect of Part XII. is that the powers of the Act are personal to the tenant for life under the settlement. He cannot contract himself out of the Act, nor can he transfer his powers to any one else, but he cannot exercise them so as to defeat a purchaser or mortgagee deriving title under him, except that, as against his own assignee, his powers of leasing at the best rent without fine continue so long as he remains in possession. Nor (s. 51) can the settlor insert in the settlement any provisions tending to prevent a tenant for life from exercising the powers conferred by the Act. But though the settlor cannot restrict, he may (s. 57) enlarge these powers. He may, for instance, make unnecessary the notice to trustees of any intended dealing, or extend the Powers not capable of restriction.

CHAPTER II.

THE SETTLED LAND ACT, 1882.

45 & 46 VICT. c. 38.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

Objects of Act.

See the remarks, as to the objects of the Act, of Baggallay, L.J., in *Re Jones*, 26 Ch. D. 736, 738; of Chitty, J., in *Re Duke of Marlborough's Settlement*, 30 *ib.* 127, 131; *Clarke v. Thornton*, 35 *ib.* 307, 311, and of Halsbury, L.C., in *Re Marquis of Ailesbury's S. E.*, 1892, A. C. 356, 362; the Court will consider the welfare of the estate, the tenants, and labourers: S. C. 1892, 1 Ch. 506, 546; see also *Re Wythes*, 1893, 2 Ch. 369, 374; *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 2 Ch. 345, 355.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SS. 1, 2.

I.—PRELIMINARY.

PRELIMINARY.

Short title;
commence-
ment; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

DEFINITIONS.

Definition of
settlement,
tenant for
life, &c.

II.—DEFINITIONS.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court

roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

S. 2.
 —
 DEFINITIONS.
 —

This subs. must be read with s. 4 of S. L. A., 1890.

S. L. A., 1890,

The definition of "settlement" here given is rather more full than that in the S. E. A., s. 2, but is in effect the same, except the words in that s. "including any such instruments affecting the estates of any one or more of such persons exclusively." The omitted words might have enabled an estate for life or other partial interest under a settlement to be sold separately. Also, the words "for the time being" in this s. are not in that s. The effect of the definition in this Act appears to be that all the instruments engrafted on the settlement of a given interest must be taken as forming part of one settlement. Where, however, a disentail and resettlement is made of a life estate, and remainder in tail, and the original life estate is not preserved, it is conceived that the resettlement alone is the settlement within this section; but where the life estate is preserved and restored (as in *Re Wright's Trustees & Marshall*, 28 Ch. D. 93), then during the lifetime of the original tenant for life the settlement, disentailing assurance, and resettlement will together, when so required (*e.g.* to override interests prior to the resettlement), form the settlement, but on his death the original settlement and disentailing assurance will no longer be within this section. The object of restoring the life estate is only to express the resulting use to the original settlement, so as to keep it in force, and enable the tenant for life to sell under either settlement. It seems, that, to overreach charges under s. 20 (2) *infra*, created by the original settlement, the trustees, to whom the purchase-money is paid, should be trustees of the original settlement. It is conceived that the decision in *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 3 Ch. 345, that a series of settlements, under which rent-charges are subsisting, form together with the last resettlement a compound settlement, cannot be supported. If this were so, to find the settlement it might be possible to go back two or three generations. Again, jointures and portions are mere charges on the settled land, an estate therefore cannot be said to stand limited to several persons "by way of succession" under a series of settlements, when the subsisting uses conferring ownership are declared solely by the last settlement, S. C. 358.

s. 4.
 Settlement.

- S. 2. The accidental devolution in different ways, after the death of the tenant for life, of estates, will not *ex post facto* constitute different settlements: *Re Freme*, 1894, 1 Ch. 1.
- DEFINITIONS.
— A limitation to A. and his successors, vicars of a parish, is not a settlement within this section: *Ex parte Vicar of Castle-Bytham*, 1895, 1 Ch. 348; and see note to s. 32, *infra*.
- Derivative settlements. Where settlements are made by persons of their interests in remainder the original settlement alone remains the settlement for the purposes of this Act: *Re Knowles' S. E.*, 27 Ch. D. 707; and compare *add. Re Earle & Webster*, 24 Ch. D. 144; *Re Ridge*, 31 Ch. D. 504. But where a base fee is settled for value and afterwards enlarged by disentail so that the settlement comprises the fee simple, the settlement and confirmatory deed of disentail would, it is conceived, together constitute the settlement for the purposes of this Act.
- Pin-money. Where a tenant for life on his marriage or for valuable consideration creates on his life interest a charge of pin-money for his wife without power to anticipate, this is part of the settlement and not an ordinary charge within s. 50 (3) (4), and can be overreached by an exercise of the powers of the Act (see s. 20 (2), *infra*, and S. L. A., 1890, s. 4): but see *Re Ailesbury S. E.*, 42 W. R. 45.
- Settlement by reference. Where land is settled by reference to the limitations of an existing settlement the result is the same as if the limitations referred to were repeated. A separate settlement is created and capital money under the first settlement cannot be applied to pay charges on land comprised in the settlement made by reference. If this were not so, a solvent estate under the first settlement might be made the means of paying the charges on an insolvent estate comprised in the second settlement. That the reverse proposition holds good is not so clear, and may depend on the terms of the second settlement: see *Re Lord Stamford's S. E.*, 43 Ch. D. 84; *Re Mundy's S. E.*, 1891, 1 Ch. 399; *Re Byng's S. E.*, 1892, 2 Ch. 219, 228. It seems clear that an order appointing trustees of one settlement would not constitute them trustees of the other settlement.
- Compound settlement. The principle in *Re Mundy's S. E.*, *ubi supra*, that where the trusts are identical for the purpose in hand the instruments constitute a compound settlement, was applied in *Re Byng's S. E.*, *ubi supra*, where the limitations were not by reference, and the powers not identical; and compare *Re Freme*, 1894, 1 Ch. 1.
- It would seem to follow from the decision in *Re Byng's S. E.*, that two separate deeds settling undivided shares may, if the limitations of each are, or come to be, the same, form one settlement.
- The settlement of an annuity charged on land, although it exceeds the rent of the land, is not a settlement of the land: see *Re Bective Estate*, 27 L. R., Ir. 364.
- The settlement need not be a legal settlement perfected by transfer of the legal estate. "Agreement" and "covenant to surrender" are expressly mentioned in s. 2 (1), and these bind the equitable "interest in" the land, s. 2 (3).

It is not necessary that all the limitations should be actually created by the instrument. It is sufficient that "under or by virtue of" the instrument, the land, or any estate or interest in it, stands limited to or in trust for any persons by way of succession. Thus a settlement within the meaning of the Act is created by conveyance on marriage to the use of the husband for life, with remainder to secure a jointure or portions, whether there is an express remainder in fee to the settlor or the fee results to the settlor. So also a settlement is created by a devise to A. for life, where the remainder in fee descends by lapse or otherwise to the testator's heir-at-law. This is made clear by subs. 2. But in the case first put, when the tenant for life is dead, the remainder in fee becomes an estate in possession subject to the charge of jointure and portions, and it is conceived that the land then ceases to be "for the time being limited to or in trust for any persons by way of succession," at any rate if the owner is of full age; but see subs. 4, and cases there cited. If the owner desires to sell free from the charges, he can do so under C. A., s. 5. The land of an infant is in any case settled land, under s. 59.

S. 2.

DEFINITIONS.

What is
succession.

An alternative limitation in fee creates an estate by way of succession (s. 58 (1) (ii.)), but a devise in fee to trustees on trust for persons not ascertained, and taking only on a future event, would not (*Re Burdin*, 28 L. J. (Ch.) 480; and compare *Re Horne's S. E.*, 39 Ch. D. 84), at least where the devise carries the whole beneficial interest (see *Genery v. Fitzgerald*, Jac. 468, 1 Jarman on Wills, 615, 5th Ed.). Where the intermediate estate (as under a devise to A. in fee simple on the death of B.) descends, the case would be within this subs. taken along with s. 58 (1) (ii.); and see *Re Atherton*, W. N. 1891, 85; *Williams v. Jenkins*, 1893, 1 Ch. 700, 702.

Alternative
gifts.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

An instance where this s. applies is a devise to A. for life, there being either no devise of the remainder in fee, or there being a devise which lapses. This remainder is made an estate coming to the heir by virtue of the settlement. The settlement, therefore, creates a succession. And see *Williams v. Jenkins*, *ubi sup.*

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

S. 2.
 DEFINITIONS.
 "Land."

"Settled
 land."

For the meaning of "Land" in Acts of Parliament passed since 1850, see note to V. and P. A., s. 1. Leaseholds and copyholds, as well as freeholds, are included under the word land (compare *Wilson v. Eden*, 16 Beav. 153). By subs. 1 the settlement comprises the instrument or instruments under which land (i.e. fee simple, copyhold or leasehold) or any estate or interest in land (i.e. in fee simple, copyhold, or leasehold) is settled, and by this subs. land (i.e. the fee simple, the customary estate, or the term in land as the case may be), and any estate or interest (in the fee simple, customary, or leasehold estate) which is the subject of the settlement is referred to in the Act as the settled land. Only that estate which is the subject of the settlement is included under the term "settled land." Therefore a power given to lease the settled land is a power to lease the interest settled. In the case of settled leaseholds, for instance, it does not enable a lease to be made binding on the reversioner in fee, nor in the case of copyholds, a lease contrary to the custom, nor in the case of an equity of redemption (that is, a settlement of land subject to a mortgage) does it enable a lease to be made binding on the mortgagee further than the original mortgagor could either under the C. A., s. 18, or otherwise have bound such mortgagee. In all cases "the settled land" means the fee simple, if that is settled; it means the equity of redemption, if that is settled; it means the customary estate, if copyholds are settled; and the estate for a term of years or lives, if leaseholds for years or lives are settled. The powers conferred by the Act only bind persons deriving title under the settlement, and not any person having a title paramount to the settlement. This is plainly seen on considering the force given to a conveyance by s. 20, *post*.

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

Duration of
 "Settlement"
 and of S. L. A.
 powers.

See on this subs., *Re Marquis of Ailesbury and Lord Iveagh*, 1893, 2 Ch. 245, 354-6; *Re Bective Estate*, 27 L. R. Ir., 364, 369; *Re Shepheard's S. E.*, 8 Eq. 571, 573-4.

The powers of an ordinary settlement cease when the estate comes to be vested absolutely in some person in fee simple; *Re Lord Sudeley and Baines and Co.*, 1894, 1 Ch. 334, 339. The S. L. A. powers, if the fee simple comes to an infant, are exercisable, either under this subs. (for the origin and history of which see *Re Marquis of Ailesbury and Lord Iveagh*, *ubi sup.*), or under s. 59; if this subs. applies, it is conceived that their exercise would have effect, under s. 20 (2) *infra*, as to charges prior to the infant's estate, subsisting under the settlement creating that estate. Sec. 59 expressly says that an infant is to be deemed tenant for life of land to which he is entitled in possession; consequently he has the powers of a tenant for life. In the case of any other person, who, under a settlement, has come to be absolutely

entitled, subject to charges, he is not tenant for life, even if the land remains under this subs., "settled land;" so there is no one to exercise the S. L. A. powers; see the two cases first cited in this note.

S. 2.

DEFINITIONS.

Where a tenant in tail in possession bars his estate tail, the S. L. A. powers are gone. So also where by surrender of a life estate the whole fee comes into possession. It is conceived in the latter case s. 50 would not operate to preserve the powers of a tenant for life. His estate is not assigned; it has ceased.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

In a case where under a will there was a trust to accumulate rents during a son's life, and after his death a trust for his children, and the trust for accumulation ran out under the Thellusson Act, and the son, as heir-at-law, came in, he was held to be, or to have the powers of, a tenant for life: *Re Atherton*, W. N. 1891, 85.

This definition taken in connection with subs. 10 (i.) and ss. 58 (1) (vi.) (viii.) (ix.) and 61 (2) (3) includes all equitable tenants for life (not being infants or of unsound mind), whether of the entirety or of an undivided share, and whether they are entitled or not to be let into possession, and the effect of the Act is that a mere equitable tenant for life, being adult and of sound mind, can convey the legal estate vested under the settlement in a trustee, that estate being the subject of the settlement (see s. 2 (3): see also note to s. 20). The case of an infant is provided for by ss. 59 and 60, and that of a lunatic, so found by inquisition, by s. 62.

Tenant for life.

An assignee of the tenant for life is not so entitled "under a settlement," but the tenant for life is; and where the tenant for life, before coming into possession, has assigned his reversionary life interest out and out, he can under s. 50, with the consent of the assignee, exercise the powers of the Act on the life estate coming into possession.

"Under a settlement"

The Court has discretion to let an equitable tenant for life into possession of the land and title deeds, but the trustees and estate must be protected; as to the effect of the S. L. A.'s upon this discretion, see *Re Wythes*, 1893, 2 Ch. 369; *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297.

Equitable tenant for life when entitled to possession.

"Entitled to possession" means that the right is immediate and not in reversion or expectancy: *Re Jones*, 26 Ch. D. 741, *per* Baggallay, L.J.; *Re Clitheroe*, 28 *ib.* 378, affirmed 31 *ib.* 135. The possession need not be personal, but may be the possession of trustees paying surplus rents and profits to a beneficial owner: *Re Morgan*, 24 Ch. D. 114; *Re Jones* and *Re Clitheroe*, *ubi sup.*, but the interest of the tenant for life must be in possession and not an interest to arise in him at a

What is "possession."

S. 2.
DEFINITIONS.

future day if then living under a conveyance then to be made: *Re Strangways*, 34 Ch. D. 423. But where he would be entitled to surplus rents (if any) it is immaterial that there are none: *Re Jones, ubi sup.* See also *Re Atkinson*, 30 Ch. D. 605, 612; affirmed 31 *ib.* 577; *Re Hale and Clark*, 34 W. R. 624; W. N., 1886, 65.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

Two or more.

The effect of this subs. is that all persons having concurrent interests *under the same settlement* must join. It would be improper, for instance, to allow a tenant for life of one undivided moiety, to sell that moiety alone; he must join with the tenant for life of the other moiety in selling the whole, but cannot be compelled to join: *Camden v. Murray*, 16 Ch. D. 161. But if each undivided moiety is settled separately, then neither moiety is the subject of the settlement made of the other moiety; each moiety is in itself settled land, and can be sold by the tenant for life thereof without the concurrence of the owner of the other: subs. 3 and 10 (i.); *Williams v. Jenkins*, W. N. 1894, 176.

A discretionary trust to pay rents during the life of A. to him or others does not constitute them together a tenant for life: *Re Atkinson*, 30 Ch. D. 605, affirmed 31 *ib.* 577.

The persons together constituting the tenant for life may severally employ their own solicitors: *Smith v. Lancaster*, 1894, 3 Ch. 439.

Undivided shares.

Under this subs., where two undivided shares are comprised in the same settlement, and one has become either originally or by disentail vested in an owner in fee, while the other share is still the subject of a tenancy for life, the tenant for life of the settled share cannot sell that share without the concurrence of the owner in fee of the other share: see *Re Collinge's S. E.*, 36 Ch. D. 516; see also s. 19; *Williams v. Jenkins, ubi supra*.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land or his estate or interest therein, is incumbered or charged in any manner or to any extent.

Who has the powers.

The powers conferred by the Act are given to the person who, under the settlement, is in the position of beneficial owner for life, subject to all charges or incumbrances, whether that ownership produces any fruit or not (see note to subs. 5 above), and he cannot, except by surrendering his estate so as to put an end to it, divest himself of the powers (see s. 50 (1)). But the rights of an assignee for value cannot be

defeated (s. 50 (3)), and his concurrence in the disposition is necessary, except to the grant of a lease under the Act where no fine is taken (s. 50 (3)), unless the assignee is in possession, and then his concurrence is necessary to the granting of all leases.

And see *Williams v. Jenkins*, 1893, 1 Ch. 704.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

This subs. must be read with s. 16 of S. L. A., 1890, which meets the case of a power or trust arising only at a future time (see *Wheelwright v. Walker*, 23 Ch. D. 752, 761; *Re Horne's S. E.*, 39 Ch. D. 84) and of a power or trust extending only to other land comprised in the same limitations. The power may be a power exercisable only with consent of the tenant for life: *Constable v. Constable*, 32 Ch. D. 233; but it has been decided in Ireland that where the power was exercisable only with the consent of a stranger, whose consent was unobtainable, the trustees for sale were not trustees for the purposes of this Act: *Re Johnstone's Settlement*, 17 L. R. Ir. 172. It is conceived, however, that this is a mere fetter on the original power, and as the tenant for life sells, the consent of strangers is not required. Those persons only are trustees for the purposes of the Act who either are appointed trustees or under the settlement have a power of sale (present or future), or of consent to or approval of the exercise of such a power, or have a trust for sale, as required by this subs. or s. 16 of S. L. A., 1890. No other trustees are trustees within the Acts. If there be no such trustees, or if there be, but they refuse to act, it is necessary to procure the appointment of trustees under s. 38.

Under settlements giving a present power of sale of the settled land, any sale, lease, &c., may be made in exercise either of the powers of the settlement or of the powers of the Act. If the Act be resorted to, the trustees with the power of sale under the settlement, or the trustees appointed under s. 38, are the trustees for the purposes of the Act.

If for any reason it is preferred to make any sale, &c., under the powers of the settlement and not under the Act, the money received and liable to be re-invested in land, may nevertheless be applied in the same manner as if it arose under the Act (s. 33).

It is conceived that executors with power to sell for payment of debts are not, but that persons with a general power of sale (as in *Re Brown*, 32 Ch. D. 597) are, trustees within this s. The power must be general. In *Re McCurdy's S. E.*, 27 L. R. Ir. 395, trustees

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Trustees of the settlement.
S. L. A., 1890,
s. 16.

Power must
be general.

S. 2.

DEFINITIONS.

Power to sell
restricted as to
price.

Power to sell
for a rent.

Powers in
future settle-
ments.

Single trustee.

What is
capital money.

with power to sell for debts were declared to be S. L. A. trustees; but they had also a future *general* power of sale, and so, under s. 16 of S. L. A., 1890 (not referred to in the Report), were S. L. A. trustees.

The principle of *Wheelwright v. Walker* would not, it is conceived, apply to prevent persons who have only power to sell at or above a certain price being trustees for the purposes of the Act. They are persons having a power of sale, though only capable of being exercised on particular terms. They are intrusted to receive purchase-money, and as the tenant for life sells the limitation of price does not apply.

Trustees having power to sell only in consideration of a rent are not trustees for the purposes of the Act: *Re Morgan*, 24 Ch. D. 114, 115.

In all settlements since the Act the proper course is expressly to appoint trustees for the purposes of the Act. It is unnecessary to insert powers similar to those contained in the Act; but in special cases larger powers may be required, and when contained in a settlement will operate under s. 57 as if conferred by the Act, so that all the powers conferred by the Act and the settlement taken together will operate as powers conferred by a single instrument, namely, the Act.

By s. 39 (2) the expression "the trustees of the settlement" is made applicable to the surviving or continuing trustees or trustee of the settlement for the time being, but this is subject to subs. 1 of that s., which prohibits payment of capital money to fewer than two persons as trustees, unless authorized by the settlement.

If it is intended to authorize the payment of capital money to a single trustee, as was usual in settlements before the Act, express authority must be given.

(9) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

The following are capital moneys under the Act, and should be paid to the settlement trustees or into Court under s. 22:—

- (1.) Money received on sale (which includes enfranchisement) or for equality of partition or exchange, and on the exercise of an option for purchase given under S. L. A., 1889.
- (2.) Fines on grants of leases under this Act (see S. L. A., 1884, s. 4), and fines on confirmation under this Act of leases, except fines on leases granted pursuant to a covenant for renewal (see note to s. 7 (2)).
- (3.) Money raised by mortgage: s. 18; S. L. A., 1890, s. 11.
- (4.) Share of mining rent (three-fourths where tenant for life is impeachable for waste in respect of the minerals leased, otherwise one-fourth) unless the settlement provides to the contrary: s. 11.
- (5.) Three-fourths of proceeds of sale of timber cut under s. 35,

where the tenant for life is impeachable for waste in respect of timber.

- (6.) Valuation money for timber, on a sale of the land, though tenant for life be unimpeachable for waste: *Re Llewellyn*, 37 Ch. D. 317.
- (7.) Money paid for licences to demise granted to copyholders, except where the licence is authorized by the custom: s. 14.
- (8.) Money paid for dedication of streets, &c., under s. 16.
- (9.) Money paid into Court under the Land Clauses Consolidation and other Acts, or in the hands of trustees and liable to be invested in the purchase of land to be settled as the settled land: ss. 32, 33.
- (10.) Money in Court so liable, though not paid in under any of those Acts: *Clarke v. Thornton*, 35 Ch. D. 307, 314.
- (11.) Proceeds of sale of heirlooms: s. 37.
- (12.) Money paid for varying or rescinding contracts for sale, exchange, or partition: s. 31 (1) (ii).

The following it is conceived are not capital moneys, but belong to the tenant for life:—

- (1.) Money paid by a lessee as a consideration for acceptance of surrender of a lease (see note to s. 13 (1)).
- (2.) Fines on the grant of leases pursuant to a covenant for renewal (see note to s. 7 (2)).
- (3.) Money paid to the tenant for life as consideration for varying the terms of a lease under s. 31 (1) (iii.), provided the varied lease is such as would be valid under the Act, and the payment be not in the nature of a premium for a lease.

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DEFINITIONS.

Moneys
belonging to
tenant for life.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

For a definition of "land" in Acts of Parliament passed since 1850, see note to V. & P. A. s. 1, *suprà*. Tithes are "land" within this subs.: *Re Esdaile*, 54 L. T. 637; W. N., 1886, 47. Also a title of honour descendible to heirs general or heirs of the body: *Re Rivett-Carnac's Will*, 30 Ch. D. 136, 139; considered in *Re Earl of Aylesford's S.E.*, 32 Ch. D. 162. So is a rent-charge: *Re Bective Estate*, 27 L. R. Ir. 364, 367.

"Land."
Tithes.
Title of
honour.

Rent-charge.

As to a personal annuity limited to a man and his heirs, see *Rivett-Carnac's Will*, 30 Ch. D. at p. 141.

Personal
annuity.

As to undivided shares, see notes to ss. 2 (6) and 19.

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes

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delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

"Rent," see *Lord Zouche v. Dalbiac*, L. R., 10 Ex. 172.

"Other reservation," i.e. in kind, see Co. Litt. 142a; *Re v. Earl Pomfret*, 5 M. & S. 139, 143; *Re Moody & Yates*, 30 Ch. D. 344, 346-7; *Campbell v. Leach*, Amb. 740.

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

See *Easton v. Pratt*, 2 H. & C. 676; *Re Daniells' S.E.*, 1894, 3 Ch. 503; and compare *Ayling v. Mercer*, W.N. 1885, 166.

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

Surface land.

A mining lease may include surface land necessary for the effective working of the minerals: *Re Reveley's S.E.*, 11 W. R. 744.

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

As to the exercise of the powers of the Court as regards land in the Counties Palatine of Lancaster and Durham, see s. 46 (8), (9) and notes thereon; and as to the jurisdiction of County Courts under this Act see s. 46 (10), and as to its application to Ireland see s. 65.

SS. 2, 3.
—
DEFINITIONS.
—

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners :

See s. 48, and the Board of Agriculture Act, 1889.

(xi.) Person includes corporation.

For rules as to words singular or plural, or importing masculine gender, and as to meaning of "month" in Acts of Parliament passed since 1850, see note to C.A., s. 2, *suprà*.

Singular.
Masculine.
Month.

III.—SALE ; ENFRANCHISEMENT ; EXCHANGE ; PARTITION.

General Powers and Regulations.

3. A tenant for life—

- (i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same ; and

SALE ; EN-
FRANCHISE-
MENT ; EX-
CHANGE ;
PARTITION.

—
*General
Powers and
Regulations.*

Powers to
tenant for life
to sell, &c.

"Land" includes any "hereditament" (see *n.* to s. 2 (3), *suprà*), so that any beneficial easement or right attached to settled land as a right of way to other land may be sold so as to extinguish it, as well as an easement burdening the settled land, created so as to sell it.

Meaning of
land.

The sale, exchange, or partition of minerals and surface separately is provided for by s. 17 ; the raising of money to pay for equality of partition or exchange is provided for by s. 18. The principal mansion-house and its pleasure ground, park and lands cannot be sold or leased without consent of the trustees or the Court : S. L. A., 1890, s. 10 ; and s. 19 contains special provision for an undivided share.

Minerals.

Mansion-house.

Undivided
shares.

The powers given by this s. are larger than the usual settlement powers. The power to sell an easement, right, or privilege over land could not before 1881 (see C. A., 1881, s. 62) be conferred under a settlement by conveyance to uses. Under the ordinary power to sell land, and in the absence of an express clause for the purpose, the surface could not be sold apart from the minerals (see *Buckley v. Howell*, 29 Beav. 546 ; T. A., s. 44 ; T. A., 1894, s. 3), and it was difficult and sometimes legally impossible to provide for all the restrictions and conditions required on sales of building land and minerals : compare *Dayrell v. Hoare*, 12 A. & E. 356 ; *Re Yates*, 38 Ch. D. 112. This s.

Easements.

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SALE; EN-
FRANCHISE-
MENT; EX-
CHANGE;
PARTITION.

General
Powers and
Regulations.

When sale
restrained.

Motive of sale.

Sale after
decree.

Incumbrances
on life estate.

and ss. 4, 17, 19, and 20, provide for all ordinary cases of sale, exchange, or partition, but no power is given to sell a right or interest not capable of alienation by a tenant in fee simple: *Re Rivett-Carnac's Will*, 30 Ch. D. 136. Further special powers may be added, and will take effect as if given by the Act: s. 57.

A tenant for life, proposing to sell at a price below that offered by a remainderman, was restrained from selling otherwise than by public auction without communicating to the remainderman any offer made: *Wheelwright v. Walker*, 31 W. R. 912; W. N. 1883, 154, and from selling until proper trustees had been appointed, *S. C.*, 23 Ch. D. 752.

But the tenant for life and the trustees under a will empowering the trustees to sell at the request of the person or persons entitled to the actual freehold, will not be restrained from selling the estate on merely speculative evidence adduced by the remainderman that the property is likely to increase in value: *Thomas v. Williams*, 24 Ch. D. 558. See also note to s. 53. A tenant for life may sell from mere caprice, or from dislike to the remainderman, or for any similar motive, but he must sell at the best price: *Cardigan v. Curzon-Howe*, 30 Ch. D. 531, 540 (see, however, note to s. 4 (1) *infra*). He may sell without the sanction of the Court, notwithstanding that an administration decree has been made before or since the commencement of the Act (*ib.* 531, 540), and may exercise the powers conferred by the S. L. A.'s, when an order for sale has been suspended: *Hampden v. Earl of Buckinghamshire*, 1893, 2 Ch. 531, 543, but not, it seems, where an order for sale has been made under the Settled Estates Act (*Re Barrs-Haden*, 32 W. R. 194; W. N. 1883, 188); and where powers of leasing have been granted under that Act the leasing powers under this Act cannot be exercised without an order suspending the earlier powers: *Re Poole*, 32 W. R. 956; *Re Barrs-Haden*, *ubi sup.* It seems therefore that an actual order for sale in an action, as distinguished from a mere administration order, prevents a sale under this Act. As to the effect on the powers of the Court under S. L. A., 1884, s. 7, of a previous order in an action giving the trustees leave to sell, see *Re Harding's Estate*, 1891, 1 Ch. 60. In *Cardigan v. Curzon-Howe*, 40 Ch. D. 341, Chitty, J., seemed to say that a tenant for life can sell "without prejudice" to the mortgagees on his life estate, and therefore subject to and with a deduction for their mortgages (see *S. C.* in C. A., 41 Ch. D. 375). But the power under this subs. is to sell "the settled land," which is defined by s. 2 (3) as "land and the estate or interest therein the subject of the settlement," that is to say, the whole estate without deduction for the mortgage. Then s. 50, after providing that the powers of a tenant for life shall continue after assignment of his estate for life, enacts "that the s. shall operate without prejudice to the assignee," not that a sale or other disposition may be made subject and without prejudice to the assignment, which would be a new power not previously given. The mortgage may be provided for and a discharge obtained under s. 5 of the C. A., 1881, or the purchaser may pay the full price without reference to the mortgage and accept an indemnity.

In this way the power of the tenant for life can be exercised without prejudice. See also s. 21 (ii.), *infra*, and *Re Sebright's S.E.* 33, Ch. D. 429, 437.

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (*infra*, Chap. vii.), affords facilities for selling, exchanging, and leasing settled land for the purposes of that Act, and the improvements on which capital money under this Act may be expended are to include dwellings for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

As to sales, &c., to County Councils, see Small Holdings Act, 1892, ss. 12 and 13.

The S. L. A. will apply "so far as circumstances admit" to a sale under the Glebe Lands Act, 1888.

A tenant for life is not, by reason of his powers under S. L. A., a person "competent to dispose of property" within Part I. of the Finance Act, 1894: see s. 22 (2) (a).

- (ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

The seignory of freehold land is an actual estate in fee simple left in the grantor after a subinfeudation to a freehold tenant made before the statute *Quia emptores*, and carrying with it the quit rents and services. When the tenant of the manor is a copyholder the fee simple estate is a reversion, the copyholder being in law a mere tenant at will. The effect of a conveyance of the seignory to the freehold tenant is necessarily to cause a merger of his subinfeudation tenure in the seignory or estate of the superior, and thus to effect an enfranchisement, that is, an extinction of the services of the inferior; but it does not extinguish the tenant's right of common: *Baring v. Abingdon*, 1892, 2 Ch. 374; *Broome v. Wenham*, 68 L. T. (N.S.), 651.

It will be observed that enfranchisement is in this subs. treated as a sale, and is consequently included under the term "sale" used subsequently in the Act, except in s. 55 (2), where enfranchisement includes enfranchisement under a power in a settlement.

- (iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

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SALE; EN-
FRANCHISE-
MENT; EX-
CHANGE;
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General
Powers and
Regulations.

53 & 54 Vict.
c. 70, s. 74.

55 & 56 Vict.
c. 31.

51 & 52 Vict.
c. 20, s. 8 (4).

57 & 58 Vict.
c. 30, s. 22.

Seignory.

Enfranchise-
ment included
in "sale."

SS. 3, 4.

SALE; EN-
FRANCHISE-
MENT; EX-
CHANGE;
PARTITION.

General
Powers and
Regulations.

Tenure not
material.

As "land" means land of any tenure, this subs. includes a power to exchange freehold for leasehold or copyhold, and *vice versa*, and it also includes an easement in existence; as to the creation of new easements generally, see S. L. A., 1890, s. 5, and of easements for mining purposes, s. 17 of this Act.

- (iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

See also s. 19, and, as to new easements, S. L. A., 1890, s. 5.

Ancillary
powers.

The following powers in this Act and S. L. A., 1890, are ancillary to those conferred by this s. :—

- (1.) To contract : s. 31.
- (2.) To substitute securities : ss. 5, 24 (4).
- (3.) To raise money by mortgage, to discharge incumbrances on settled land : S. L. A., 1890, s. 11.
- (4.) To raise money for equality of exchange or partition : s. 18.
- (5.) To concur in regard to undivided shares : s. 19.
- (6.) To deal separately with surface and minerals : s. 17.
- (7.) For trustees to receive : s. 22, and give receipts for money not paid into Court : s. 40.
- (8.) To convey land disposed of : ss. 20, 55 (2).
- (9.) To settle land acquired : s. 24.
- (10.) To deal with easements on an exchange or partition : S. L. A., 1890, s. 5.
- (11.) To carry into effect a predecessor's contracts : S. L. A., 1890, s. 6.
- (12.) To make sale to, or exchange or partition with, the tenant for life himself : S. L. A., 1890, s. 12.

Notice.

Notice of intention to sell, &c., must be given by the tenant for life under s. 45, as amended by S. L. A., 1884, s. 5, but a person acting in good faith is exempted from inquiry whether notice has been given, s. 45 (3) of this Act. S. 53 of this Act places the tenant for life in the position of a trustee in exercising the powers of the Act : see *Re Marquis of Ailesbury's S. E.*, W. N., 1891, 167 ; 1892, 1 Ch. 506.

Regulations
respecting
sale, enfran-
chisement,
exchange and
partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

See, however, S. L. A., 1890, s. 18, *infra* ; the Housing of the Working Classes Act, 1890, s. 74, *infra*, Chap. vii. ; the Small Holdings Act, 1892, s. 12.

The Court has allowed, for the benefit of a building estate, paid-up shares in a Waterworks Company to be allotted in lieu of purchase money : *Re Orwell Park Estate*, W. N., 1894, 135.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

The consideration may be an easement : see S. L. A., 1890, s. 5.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

"England" in Acts of Parliament includes Wales and the town of England. Berwick-on-Tweed (20 Geo. 2, c. 42, s. 3), but not in deeds or other documents.

SS. 4, 5.

SALE; EN-
FRANCHISE-
MENT; EX-
CHANGE;
PARTITION.

General
Powers and
Regulations.

Paid-up shares
consideration.

Special Powers.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or

*Special
Powers.*

Transfer of
incumbrances
on land sold,
&c.

SS. 5, 6.

SALE; EN-
FRANCHISE-
MENT; EX-
CHANGE;
PARTITION.

*Special
Powers.*

on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged there-with or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

Incumbrance.

"Incumbrance" within the meaning of this s., includes a charge having priority to the settlement, although no money has been actually raised under it, but not a charge created by, or in exercise of any power in, the settlement, on which no money has been actually raised. The last-mentioned charge is, but the other is not, overreached by the conveyance of the tenant for life under s. 20 (2). A substituted security of any other part of the settled land may be given under this s. for any charge not overreached.

This s. does not, by implication, prevent capital moneys arising from one part of an estate, from being applied in discharge of incumbrances on another part; *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 94.

See also s. 24 (4) *infra*, and S. L. A., 1890, s. 11.

LEASES.

*General
Powers and
Regulations.*

Power for
tenant for life
to lease for
ordinary or
building or
mining
purposes.

IV.—LEASES.

General Powers and Regulations.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

- (i.) In case of a building lease, ninety-nine years:
- (ii.) In case of a mining lease, sixty years:
- (iii.) In case of any other lease, twenty-one years.

Tenant for
life's power
of leasing.

As before stated, "land" includes land of any tenure: see n. to s. 2 (3), therefore this s. applies to copyholds and leaseholds as well as freeholds, but by s. 2 (3) this Act applies only to "the estate or interest which is the subject of the settlement," and does not authorize the granting of any lease not warranted by that estate or interest. A tenant for life of leaseholds therefore cannot grant a lease extending beyond the term which is the subject of the settlement, nor can a copyholder grant a lease not warranted by custom or permitted by license.

On the same principle, though the powers of leasing given by this s. to a tenant for life are properly larger than the powers given to a mortgagor by s. 18 of the C. A., 1881, still as against a mortgagee of the fee simple whether prior to the settlement or not, the powers given by s. 18 of that Act can alone be exercised. But the mortgagee of the tenant for life if not in possession stands in no better position than the successors in title, except that as against him no lease at a fine can be made, but he is bound by any other lease: s. 50 (3).

Leases may be made by an equitable as well as the legal tenant for life, so as to create a legal term where the legal estate is the subject of the settlement (s. 20), and the rent and the benefit of the covenants become annexed to and run with the legal reversion (C. A., s. 10).

It is conceived that a single lease of contiguous land, held under two settlements with different remainders over, is not within this s., see *Tolson v. Sheard*, 5 Ch. D. 19; Farwell on Powers, 2nd ed., 598. And as to a lease of settled land with chattels not settled, see the arguments in *Dowager Duchess of Sutherland v. Duke of Sutherland*, 1893; 3 Ch. 169, 182, 186. It seems that a tenant for life may in good faith lease to his wife, see S. C., 196. In the exercise of the statutory power of leasing no reference need be made to the Act, and this is the usual practice: *Mogridge v. Clapp*, 1892; 3 Ch. 382, 385. A lessee, dealing in good faith, is not bound to inquire whether there are trustees for the purposes of the Act, nor affected by the fact that there are none unless he has actual notice.

SS. 6, 7.

LEASES.

General
Powers and
Regulations.Larger than
mortgagor's
power.Lease by
equitable
owner.Land under
two settle-
ments.Settled land
and chattels
not settled.

Lease to wife.

No reference
to Act.No trustees
required.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

Regulations
respecting
leases
generally.

A lease for a term not exceeding three years may now be by writing only: S. L. A., 1890, s. 7 (iii.).

The effect of this subs. is that every existing lease must be surrendered unless it is within one year of expiring (*Re Farnell*, 33 Ch. D. 599): or unless the new lease be made to the person in possession under the old lease, when it will, without any actual surrender, operate as a surrender in law (Sug. Pow. 8th ed., 763).

A concurrent lease is not a lease "taking effect in possession:" see Farwell on Powers, 2nd ed., pp. 611, 619-20; Sugden on Powers, 8th ed., pp. 769-77.

Concurrent
lease.

As to what is a lease in possession see *n. to C. A., s. 18 (5), ante*, and *n. to s. 13, post*; and as to what is not: *Dowager Duchess of Sutherland v. Duke of Sutherland*, 1893, 3 Ch. 169, 192.

Lease in
possession.

Under 4 Geo. 2, c. 28, s. 6, when a lease is duly surrendered in order to be renewed, it is not necessary to obtain a surrender of underleases, but the new lease is, without surrender of underleases, made as valid as if the underleases had been surrendered, and the underlessees are placed in the same position as regards re-entry, etc., as if the old

Surrender of
underleases
on renewal.

S. 7.

LEASES.**General
Powers and
Regulations.**

lease had been kept on foot: see *Re Ford's S. E.*, L. R., 8 Eq. 309; and 8 & 9 Vict. c. 106, s. 9.

It may be a question whether the Act of Geo. 2 enables a lease to be made under this s. without surrender of all underleases. Clearly the lease could not be so made at a higher rent, or with more onerous covenants than the surrendered lease, as then there would be no remedy against the underlessee for anything more than the liability under the surrendered lease.

"Month."

"Month" means calendar month: see n. to C. A., s. 2.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

"Rent."

"Rent" includes reservations in kind as well as money, s. 2 (10) (ii.) and n. thereon *suprà*.

Value of
surrendered
lease.

The value of a surrendered lease may be taken into account in fixing the rent of a new lease, s. 13 (5); and as to its being unnecessary to take into account, on a lease to a tenant of a holding, the value of his improvements: see the Agricultural Holdings (England) Act, 1883, s. 43. As to leases to County Councils, see Small Holdings Act, 1892, s. 12; and for working classes, see Housing of the Working Classes Act, 1890, Ch. vii., *infra*, and s. 18, S. L. A., 1890.

Leases to
County
Councils, and
for working
classes.

By S. L. A., 1884, s. 4, a fine paid for a lease under this Act is capital money unless the contrary is provided.

Fine.

Where at the date of the settlement the settled land is subject to a lease containing a covenant for renewal on a fine, the tenant for life will be entitled to receive the fine for his own use. He is bound to grant the lease independently of this Act, and s. 12 (ii.) enables him to create a legal term without the aid of the Court. The fine is a casual profit similar to the fines and heriots payable to the lord of a manor (*Brigstocke v. Brigstocke*, 8 Ch. D. 357). On the construction of a settlement, a tenant for life may be entitled to all fines (*Simpson v. Bathurst*, L. R. 5 Ch. App. 193).

"Best rent."
"Money laid
out."

As to best rent, see *Dowager Duchess of Sutherland v. Duke of Sutherland*, 1893, 3 Ch. 169, 195. "Money laid out" does not cover past voluntary expenditure, and must be with reference to the granting of the lease: *Re Chawner's S. E.*, 1892, 2 Ch. 192, 196.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

Agreement for
lease.

A lease for three years or less may be by writing only, with an

agreement instead of a covenant by the lessee for payment of rent (S. L. A., 1890, s. 7 (iii.)).

A condition of re-entry under this subs. allowing more than thirty days would be void: *Doe v. Burrough*, 6 Q. B. 229.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

The execution of counterpart need not be contemporaneous with the lease: *Foyer v. Combs*, 11 A. & E. 403, 406; Farwell on Powers, 2nd ed., 634.

(5.) A statement, contained in a lease or in an endorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

A statement of fact, indorsed on a lease, and signed by the tenant for life, that money covenanted in the lease to be laid out by the lessee has been laid out accordingly, and a statement of calculation recited in a lease that the rent thereby reserved does not exceed one-fifth part of the full annual value of the land comprised therein with the buildings thereon when completed (see s. 8 (3) (iii.)) are instances of statements within the meaning of s. 7 (5).

As to the power of a tenant for life to contract for leases, see s. 31 (1) (iii.) (2). And as to notice of intended leases, see s. 45 as amended by S. L. A., 1884, s. 5; and S. L. A., 1890, s. 7 (i.); and as to the absence of trustees of the settlement being immaterial in case of leases for twenty-one years or less, see the same s. (ii.); and as to building leases, see *Mogridge v. Clapp*, 1892, 3 Ch. 382, 395.

Building and Mining Leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement

SS. 7, 8.

LEASES.

General
Powers and
Regulations.

Re-entry.

Statement of
fact or calcu-
lation.

Contract to
lease.

Notice.

Building and
Mining Leases.

Regulations
respecting
building leases.

SS. 8, 9.

LEASES.

*Building and
Mining Leases.*

authorized by this Act, for or in connection with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

As to what are building purposes, see s. 2 (10) (iii.), *suprà*.

Past considera-
tion.

A lease cannot be granted at less than the "best rent" in consideration of past voluntary expenditure; the words "in consideration" import a consideration in law: *Re Chawner's S. E.*, 1892, 2 Ch. 192.

Repairing and
building leases.

As to repairing and building leases, see *Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251, 256, and cases there cited; also *Hallett v. Martin*, 24 Ch. D. 624. It seems that an agreement to expend a fixed sum in repairs is within this s.; but the Court, in the exercise of its discretion under S. L. A., 1884, s. 7 (i.), refused to sanction a lease for thirty years containing such an agreement, on the ground that, in the case before it, the repairs were such as the tenant for life ought herself to have done: *Re Daniells' S. E.*, 1894, 3 Ch. 503.

A lease of part, not built upon, of land comprised in a building agreement, is not a building lease within this s.: *Re Sabin*, W. N. 1885, 197.

Option to
purchase.

A tenant for life may now grant building leases with an option to purchase the fee simple within ten years: see S. L. A., 1889, s. 2.

Regulations
respecting
mining leases.

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to

vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

SS. 9, 10.

LEASES.*Building and Mining Leases.*

S. L. A., 1890, s. 8, *infra*, provides that the rent may vary with the price of the minerals; see also, s. 2 (10), (ii.), (iv.), *supra*.

Rent variable with price.

- (ii.) A fixed or minimum rent may be made payable with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with mining purposes.

10.—(1.) Where it is shewn to the Court with respect to the district in which any settled land is situate, either—

Variation of building or mining lease according to circumstances of district.

- (i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or
- (ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in

SS. 10, 11.

LEASES.*Building and
Mining Leases.*

the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

This s. is supplemented, as to grants in fee simple for building purposes, by S. L. A., 1890, s. 9, which provides for a perpetual rent or rent-charge reserved on such a grant being swept into the settlement.

As to leases to County Councils in perpetuity or at fee-farm rents, see Small Holdings Act, 1892, s. 13.

For form of summons under this s. see Forms III., IV., and V., *infra*, Chap. VIII.

A general authority to grant building leases for 200 years, of the estate of an infant tenant in tail of the age of eighteen years, was refused in *Cecil v. Langdon*, 54 L. T. 418.

For orders under this s., see Seton, 5th ed., pp. 1574-7.

Part of mining
rent to be
set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

This s. does not apply to a lease made under s. 12 (i.), *infra*, for giving effect to the contract of a predecessor who was owner in fee: *Re Kemys-Tynte*, 1892, 2 Ch. 211.

As to portion
of rent set
aside as
capital.

Under the S. E. A., s. 13, the leasing powers are to be given to trustees, and the portion of rent to be set aside as capital is by the lease made payable to them. Under this s. the tenant for life grants the lease, and the whole rent must be reserved to him as the reversioner. The trustees are not required to be parties to the lease, nor is it provided that the portion of rent to be set aside as capital shall be paid to them by the lessee. They need not necessarily know

of the lease. It seems therefore that the tenant for life must receive the whole rent, and pay over to the trustees the part to be set aside as capital: but see Forms II. (f), X., Chap. VIII., *infra*.

The portion of rent set aside under this s. is in effect the consideration paid by the tenant for life for the privilege of granting the lease for sixty years. But the Act does not affect any of his common law rights, as tenant for life, to open and work mines if he is unimpeachable for waste, and to work open mines if he is impeachable for waste. It will probably become the practice to provide expressly against capitalising any part of a mining rent, thus placing the tenant for life in the same position as under a settlement with the usual leasing powers. And accordingly Stirling, J., in a case of *Basset v. Higgins* (January 1895), where a settlement was made under the direction of the Court, pursuant to a will which contained no special direction on the point, allowed a clause exempting the tenant for life from setting aside any part of the mining rent as capital: compare *Daly v. Beckett*, 24 Beav. 114, 123.

The words "where the tenant for life is impeachable for waste in respect of minerals" do not apply to the case of a tenant for life of open mines. A tenant for life may work open mines although impeachable for waste (*Clavering v. Clavering*, 2 P. Wms. 388; *Viner v. Vaughan*, 2 Beav. 466), consequently on a lease under the Act of such mines, one fourth only of the rent is required in any case to be set aside. The provision for setting aside is in effect the same as that in the S. E. A., s. 4 (3).

A tenant for life of the proceeds of sale under a trust for sale and entitled to the rents until sale, though not properly impeachable for waste, must set aside three fourth parts of the mineral rent under a lease of unopened mines: *Re Ridge*, 31 Ch. D. 504.

As to what is "a contrary intention" within the meaning of this s., see *Duke of Newcastle's Estates*, 24 Ch. D. 129, 143; *Re Bagot*, 1894, 2 Ch. 177, 184.

For a form of summons by a lessee for payment into Court of the part of the rents to be set aside under this s., see Forms II. (f), X., *infra*, Chap. VIII., and for an order for such payment, see *Seton*, 5th ed., 1517.

SS. 11, 12.

LEASES.

Building and Mining Leases.

Impeachable for waste in respect of minerals.

Tenant for life of proceeds of sale.

Contrary intention.

Special Powers.

Special Powers.

12.—The leasing power of a tenant for life extends to the making of—

Leasing powers for special objects.

- (i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

SS. 12, 13.

LEASES.

Special Powers.

"Predecessors in title" includes all predecessors, those prior to as well as those under the settlement. In like manner "successor in title" in s. 31 (2) includes a successor subsequent to as well as a successor under the settlement.

As to the effect of a contract of the kind mentioned in this subs. made before this Act, see *Davis v. Harford*, 22 Ch. D. 128.

Under this subs., a contract by an owner in fee, to grant a lease which could not have been granted under the S. L. A., can be effectuated: *Re Kemeys-Tynte*, 1892; 2 Ch. 211, 214; in which case it was held, p. 213, that S. L. A., 1890, s. 6, did not apply to leases.

- (ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

Where a testator who has contracted to grant a lease dies, having devised the property in settlement, or where the land is leased with a covenant for renewal, the tenant for life could not, except under an express power for the purpose, give the lessee a legal term without the aid of the Court, to be obtained in an action by the lessee for specific performance. In *Cust v. Middleton* (3 De G. F. & J. 33) an Act of Parliament was thought necessary in order to carry into effect the contracts of the testator in the case first mentioned. The effect of subss. (i.) and (ii.) of this s. is to render an action unnecessary in either case.

And as to the validity of covenants for renewal in leases under powers, see *Gas Light & Coke Co. v. Towse*, 35 Ch. D. 519.

- (iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Where a lease was void for some want of compliance with the power, and the power required the best rent to be reserved, it was sometimes impossible, on account of building or improvements effected by the lessee increasing the value, to give him a valid lease on the terms to which he was justly entitled. This subs. now enables the proper lease to be granted, adopting the principle of the Acts 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17.

Surrenders.

Surrender and
new grant of
leases.

Surrenders.

- 13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land,

whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

S. 13.

LEASES.

Surrenders.

This s. appears to enable an equitable tenant for life having no legal reversion to accept a surrender of a term so as to merge it, just as s. 6 enables him to grant a lease creating a legal term, though he has no legal estate. He acts in each case under the statutory authority conferred by this Act; and the surrender would be legally good so as to effect a merger of the term even as against a mortgagee of the equitable life estate, and therefore, it would seem, sufficient to enable the grant of a new lease in possession. But where the life estate is a legal estate, the legal reversion would be in the mortgagee and his consent to accept the surrender seems necessary (see *n. to C. A.*, s. 18 (5)), so that a valid new lease could not be granted under s. 7 (1) unless the mortgagee's acceptance of the surrender of the previous lease be obtained: but see s. 50, *infra*.

Acceptance of
surrender by
equitable
tenant for life.

When sufficient
to enable new
lease.

Money paid to a tenant for life as the consideration for accepting the surrender of a lease belongs, as a general rule, to him absolutely. The rule is not expressly altered by this s., but will, it is conceived, still hold good as to all leases, whether made under the powers of the Act or otherwise, and notwithstanding the provisions of s. 53, this s. being merely in affirmance of the common law right of a legal tenant for life (as to which, see Sugden on Powers, 8th ed., 763; *Wilson v. Sewell*, 1 W. Blackstone, 617), with an extension to the case of an equitable tenant for life; but not otherwise altering the position of a tenant for life. But it is conceived that where the surrender is one which an actual trustee would not be justified in accepting, the tenant for life could not retain for his own use the sum received (see note to s. 53). Thus, if there were a lease of five acres at £10 rent, and the tenant for life should under subs. 2 take a surrender of one acre, apportioning £9 as the rent of that acre, and leaving £1 only payable in respect of the other four acres, payment being made to him for so doing, this would be a clear breach of duty towards the remaindermen, and as the apportionment would be made under a power conferred by the next subs., it can scarcely be doubted that the tenant for life would be held liable as trustee for the sum received by him, and that it would be treated as capital money.

Consideration
for surrender.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

SS. 13, 14.

LEASES.

Surrenders.

As to surrender of underleases, see *n. to C. A.*, s. 18 (5), and to s. 7 (1) of this Act.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

Subs. 5 enables the value of a lease beneficial to the lessee, which is surrendered, to be taken into account on the grant of a new lease. Under the ordinary power of leasing this could not be done: *Sug. Powers*, 8th ed., 787.

(6.) Every new or other lease shall be in conformity with this Act.

*Copyholds.**Copyholds.*

Power to grant
to copyholders
licences for
leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

Fine on licence,
whether
capital.

If the licence be granted on a fine, the question whether the fine is capital or casual profit must be decided on the same principle as in case of a fine on an ordinary lease under this Act (see *n. to s. 7 (2)*). If the licence is in accordance with the custom, it is not granted under this Act and the fine will be casual profit. Where a manor is brought

into settlement, it is best to provide expressly for the fines: *Simpson v. Bathurst*, L. R. 5 Ch. 193. SS. 14, 15, 16.

By a licence under this s. it is conceived that the copyholder can only grant a lease in all respects the same as a tenant for life could grant under this Act. If this were not so, an onerous lease, at a large fine, might be granted, and the succeeding lord would be prejudiced in case of forfeiture or escheat.

Where the lord is restricted by custom from granting licences to lease beyond a certain term, as in *Hanbury v. Litchfield* (2 My. & K. 629), this s. will not enable him any more than a tenant in fee simple to override the custom by a mere licence. Notwithstanding the licence, a lease by the copyholder for a term longer than that allowed by the custom will be a forfeiture capable of being enforced by the next succeeding lord. Nor could the tenant for life by joining in the demise make a lease contrary to the custom, such lease being in the nature of an underlease and not a lease in possession, s. 7 (1). A lord entitled in fee simple might by joining with the copyholder grant a lease not warranted by the custom, but this, it is conceived, would be a lease by the lord, and a release of his right by the copyholder, so that the reversion would be in the lord and not in the copyholder.

LEASES.

Copyholds.

Effect of licence.

Act does not override custom.

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

Mansion and Park.

15. *Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.*

This s. is repealed, and with some variation, re-enacted, by S. L. A., 1890, s. 10.

SALES, LEASES, AND OTHER DISPOSITIONS.

Mansion and Park.

Restriction as to mansion-house, park, &c.

Streets and Open Spaces.

16. On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

- (i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use gratuitously or on payment, of the public or of individuals, with sewers, drains,

Streets and Open Spaces.

Dedication for streets, open spaces, &c.

S. 16.

SALES, LEASES,
AND OTHER
DISPOSITIONS.*Streets and
Open Spaces.*

watercourses, fencing, paving, or other works necessary or proper in connection therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be enrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Dedication to
the public.

Dedication to the public is a term generally applied to the act of throwing roads open to the use of the public, but without the aid of this s. an effectual dedication could only be made by an owner of the fee simple. A dedication by a leaseholder or tenant for life in right of his estate does not bind the reversioner or remainderman: *Wood v. Veal*, 5 B. & Ald. 445; *Harper v. Charlesworth*, 4 Barn. & Co. 519. This s. enables a tenant for life to bind those in remainder.

Different from
conveyance.

A conveyance of land to trustees on trust for public purposes is not strictly a dedication to the public; it is the creation of a trust for charitable purposes (all public purposes being charitable purposes, see 1 Jarm. Wills, 166, 5th ed.), and the deed of conveyance must be enrolled and otherwise perfected according to the provisions of the Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). A conveyance to a local authority or corporation can only be made where they are empowered by statute to acquire the land. They then acquire it as their own property and not as trustees, and the Act last mentioned does not apply. On a simple dedication to the public the freehold in the soil still remains in the person making the dedication (*R. v. Pratt*, 24 L. J. (M.C.) 113), unless by any statute it becomes transferred to a local

authority, see Public Health Act, 1875, s. 149; *Coverdale v. Charlton*, 4 Q. B. D. 104; *Baird v. Mayor of Tunbridge Wells*, 1894, 2 Q. B. 867; Metropolis Local Management Act, 1855, s. 96; *Rolls v. Vestry of St. George, Southwark*, 14 Ch. D. 785; Local Government Act, 1888; *Curtis v. Kesteven County Council*, 45 Ch. D. 504; Local Government Act, 1894. It is not necessary that a deed effecting a simple dedication to the public should be perfected as required by the Charitable Uses Act; it operates merely as evidence of the transaction, and not as a conveyance.

Sect. 55 (2) gives a general power to the tenant for life under which he may make any conveyance necessary for giving effect to the provisions of this s.

Expenses incurred in executing works under this s. may be raised by mortgage under s. 21 of the S. E. A., or they may be paid for out of any money being or representing capital money under this Act: see ss. 21 (x.), 25 (xvii.), 32, and 33.

SS. 16, 17.

SALES, LEASES,
AND OTHER
DISPOSITIONS.

*Streets and
Open Spaces.*

Conveyance to
give effect to
this s.

Cost of works
under this s.

Surface and Minerals apart.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

See also S. L. A., 1890, s. 5.

Under a power in a settlement easements could not formerly be granted as they could not be raised by way of use. This difficulty has been removed by the C. A., 1881, s. 62; but no question of the kind can arise under this Act, which gives a common law power to convey the fee independently of the Statute of Uses.

This s. effects the same object as the T. A., s. 44, but without any necessity for obtaining the previous sanction of the Chancery Division.

Trustees may under this s. during a minority sell surface apart from minerals, though this is not authorized by the power of sale in the settlement, and the sale being under the statutory power the consent of guardians to a sale, required by the settlement power, is not necessary: *Duke of Newcastle's Estates*, 24 Ch. D. 129, 142.

*Surface and
Minerals
apart.*

Separate
dealing with
surface and
minerals, with
or without
wayleaves,
&c.

Grant of
easements.

Consent of
guardians to
sale by trustees
not necessary.

SS. 18, 19, 20.

SALES, LEASES,
AND OTHER
DISPOSITIONS.*Mortgage.*Mortgage for
equality
money, &c.*Mortgage.*

18. Where money is required for enfranchisement or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

As to mortgages, see S. L. A., 1890, s. 11.

The money raised by mortgage under this s. being capital money must be paid either to the trustees or into Court (s. 22). The receipt of the trustees is a complete discharge, and the person making the advance is absolved from seeing that it is necessary to raise the money (s. 40), or that the requirements of the Act are complied with (s. 54).

For a form of summons for payment into Court by a mortgagee under this s., see Rules under S. L. A., 1882, Form XI., Chap. VIII., *infra*; as to raising money for enfranchisement of copyholds, see also Copyhold Act, 1894, s. 36.

*Undivided
Share.*Concurrence in
exercise of
powers as to
undivided
share.*Undivided Share.*

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

See, on this s., *Re Collinge's S. E.*, 36 Ch. D. 516; *Williams v. Jenkins*, W. N., 1894, 176.

And, as to duties of a fiduciary vendor concurring with owners of other property: *Re Cooper & Allen*, 4 Ch. D. 802.

Sale to co-
owner.

It seems that a sale may be made under the Act to a co-owner: *Re Gaitskell*, 40 Ch. D. 416.

*Conveyance.**Conveyance.*

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land

sold, given in exchange, or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

- (i.) All estates, interests, and charges having priority to the settlement; and
- (ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and
- (iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry;

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SALES, LEASES,
AND OTHER
DISPOSITIONS.

Conveyance.

Completion of
sale, lease, &c.,
by conveyance.

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Conveyance.

and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

Easements,
rights, and
privileges.

The reference in this s. to "easements or other rights or privileges sold or leased," applies only to cases where they are conferred apart from the land, and created *de novo* on a sale or lease (see note to s. 3 (iii.) and s. 17).

Conveyance.

This s. confers on the tenant for life a power, generally called a common law authority, as the exercise of it enables him to transfer the common law seisin (Sugden on Powers, 45, 8th ed.); but it is more properly a statutory power. The land passes not as under ordinary settlements by revocation and appointment of uses, but by conveyance of the estate itself in the land, in the same way as when a testator authorizes his executors to sell his lands without making any devise to them. The usual mode of exercising such a power in a will is by bargain and sale at common law (i.e. not a bargain and sale passing the use merely and requiring enrolment under 27 Hen. 8, c. 16).

How convey-
ance operates.

The conveyance under this s. passes the common law estate in the case of freeholds and leaseholds, and the right to admission in the case of copyholds, and that whether the person conveying has a legal or equitable estate, and on the estate so passed, in case of freeholds, uses may be declared. Also, in case of copyholds admittance may be had without any surrender, and the conveyance divests any legal estate vested in trustees under the settlement. On the grant of a lease the term created is a legal term, and the C. A., ss. 10, 11, annexes the rent and covenants in every case to the legal reversion, notwithstanding that the lessor has no legal estate. But this Act only operates on the estate, which is the subject of the settlement, and the legal estate passes only where it passed under, or has been otherwise conveyed to the uses of, the settlement, and has not been subsequently disposed of to secure money actually raised. If there be a mortgage in fee outstanding prior to the settlement, or made since under a power, the legal estate conferred by the mortgage will not be overreached or defeated by a conveyance under this Act, but where a lease can be granted binding on the mortgagee under the C. A., s. 18, a legal term will be created.

Lease.

Rent, &c.,
annexed to
reversion.

Estate of
trustees.

It follows that where leaseholds or copyholds are vested in trustees on trusts corresponding to uses declared of land conveyed in fee simple, or where the legal estate in freeholds is vested in the trustees,

they will not be necessary parties to convey; the conveyance by the tenant for life alone divests the estate of the trustees. But it is conceived that the legal estate, in order to pass by the tenant for life's conveyance, must in some way be expressly made subject to the settlement. For instance, if an equity of redemption subject to a mortgage be settled, the mere payment of the mortgage money would not enable the tenant for life to convey the legal estate vested in the mortgagee. If, however, the settlement be by way of trust and not in such a form as would create legal limitations, then after a re-conveyance to the proper trustees, such re-conveyance being part of the settlement, the tenant for life could convey the legal estate though not actually derived through the settlement itself. It is conceived that the re-conveyance must be in the proper form and to the proper trustees. If the legal estate is made to vest in the trustees when it ought to be conveyed to uses, it seems doubtful whether the conveyance of the tenant for life would pass it.

As regards copyholds (subs. 3), the steward will enter on the rolls the settlement in the same manner as a will giving executors or trustees power to sell would be entered, and he will also enter the deed of conveyance. The rolls will thus be complete as regards the title, no surrender being necessary.

Where a testator who has not been admitted devises his copyhold on trust, and the tenant for life sells before the trustees are admitted, the lord is not entitled to a fine on the admission of the trustees as well as a fine on the admission of the purchaser: *Re Naylor and Spendla*, 34 Ch. D. 217 (*dissentiente*, Fry, L.J.). The will and the Act taken together operate as if the will had given the tenant for life express power to sell, in which case only one fine would be payable. This seems to answer the difficulty felt by Fry, L.J., the testator having died in 1885.

A conveyance under this s. will be similar in its overreaching effect to a revocation of uses and re-appointment under a power in a settlement. It follows that a purchaser is not concerned with the payment of succession duty payable under the settlement: *Re Warner's S. E.*, 17 Ch. D. 711; (7 Bythewood & Jarman, 4th. ed. 294, 295). Such a conveyance overreaches a sale by the remainderman, though made before the Act (*Wheelwright v. Walker*, 23 Ch. D. 752); and the same principle applies to a mortgage by a remainderman; the assignee of a remainderman has no higher rights than the remainderman himself, but an assignee of the tenant for life who is exercising the power cannot be affected without his consent: see s. 50 (3) (4), and note thereto.

It is conceived that under subs. 2, a family charge—e.g. a jointure or portion—will be displaced by a conveyance by the tenant for life, as against the jointress or portioner, or any assignee from them, whether by way of purchase, mortgage, or otherwise. But if money has been actually raised to meet the charge, by the conveyance of a term, whether created by, or under powers in, the settlement

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AND OTHER
DISPOSITIONS.

Conveyance.

Enrolment of
copyhold
assurance.Fine on
admission.What estates
overreached.
Succession
duty.Assignee of
remainderman.Assignee of
tenant for life.Family
charges.

SS. 20, 21.

SALES, LEASES,
AND OTHER
DISPOSITIONS.

Conveyance.

itself, or, in the case of a jointure, under C.A., s. 44 (4), the conveyance by the tenant for life will, under subs. 2 (ii.), be subject to the term.

In framing a re-settlement by tenant for life and tenant in tail, where there is a charge of jointure or portions under the subsisting settlement, the estate for life under that settlement should be preserved or restored, and then the powers in the settlement will continue (see Farwell on Powers, 2nd ed. 17; *Re Wright's Trustees & Marshall*, 28 Ch. D. 93). A sale under the statutory power conferred by a new estate for life under the re-settlement would not, it is conceived, overreach the previously existing jointure or portions; see *n. to s. 2 (i.)*, *suprà*.

Power of
trustees
restricted.

Any possible conflict between a conveyance by the tenant for life and a conveyance by the trustees is prevented by the latter part of s. 56 (2), which precludes trustees from exercising powers similar to those given by the Act unless the tenant for life consents.

Title deeds
held by
trustees.

Where the estate of the tenant for life is equitable merely, and his trustees hold the deeds (but see *Re Burnaby's S. E.*, 42 Ch. D. 621; *Re Wythes*, 1893, 2 Ch. 369, for decisions giving him the custody on terms), and also *Re Beddoe*, 1893, 1 Ch. 547; *Re Newen*, 1894, 2 Ch. 297; it may be a question whether trustees for purposes of the Settled Land Acts are or are not bound, on a sale by him, to give an acknowledgment of the purchaser's right to production, and see *Onslow v. Lord Londesborough*, 10 Hare, 67, 75.

Enfranchise-
ment.

Enfranchisement is included in this s., see note to s. 3 (ii.).

In addition to the special powers given by this s., a general power is given by s. 55 (2) for completing sales, &c., under this Act.

As to power for tenant for life to convey, so as to carry out a predecessor's contract, see S. L. A., 1890, s. 6; and for trustees to do so, on sale, &c., to tenant for life himself, s. 12 of that Act.

INVESTMENT
OR OTHER
APPLICATION
OF CAPITAL
TRUST MONEY.

VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

Capital money
under Act;
investment,
&c., by
trustees or
Court.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others, of the following modes (namely):

See s. 2 (9) and *n.* thereto *suprà*.

Mortgagee
may be paid.

The words "subject to payment of claims," &c., enable the purchase-money to be applied in discharge of what is due to a mortgagee who concurs in conveying.

The Court will not make a prospective order as to capital money not yet received; *Re Millard's S. E.*, 1893, 3 Ch. 116; *Re Marq. of Bristol's S. E.*, *ib.* 161.

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INVESTMENT
OR OTHER
APPLICATION
OF CAPITAL
TRUST MONEY.

“When
received.”

- (i.) In investment on Government securities or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

See, as to the securities on which trustees are by law authorized to invest trust money: T. A., part i.

Where money or investments are held upon trust to purchase land to be settled, the trustees may invest in accordance with this subs.: *Re Mackenzie's Trusts*, 23 Ch. D. 750; *Re Tennant*, 40 Ch. D. 594; *Re Mundy's S. E.*, 1891, 1 Ch. 399; *Re Byng's S. E.*, 1892, 2 Ch. 219. An investment in debentures issued by a local authority under s. 27 of the Local Loans Act, 1875 (38 & 39 Vict. c. 83) was disallowed in *Re Maberly*, 33 Ch. D. 455; but see now T. A., ss. 1 (m); 5 (3).

Interim investment of money to be laid out in land.

As to sending capital money abroad: *Re Lloyd*, W. N., 1886, 37.

- (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

See *Re Sebright's S. E.*, 33 Ch. D. 429, 437.

This subs. includes a mortgage for a long term, which is one mode of mortgaging the fee simple, and “affects the inheritance”: *Re Frewen*, 38 Ch. D. 883, and see remarks of Chitty, J., in *Re Eddale*, 54 L. T. 637, 640, also a mortgage of leaseholds by sub-demise, which is the usual mode of mortgaging leasehold, and “affects the whole estate the subject of the settlement.” An incumbrance on the estate of the tenant for life is excluded, and so is a terminable charge, as a jointure rent-charge. S. 53 is alone sufficient to prevent a tenant for life paying off a charge of any such kind out of capital.

Incumbrance.

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 —
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 OF CAPITAL
 TRUST MONEY.

Land tax.
 Estate duty.
 Improvement
 rent-charge.
 Agricultural
 Holdings Act
 charge.

Annual sum
 out of tithes.

As to redemption of land tax, see also 42 Geo. III. c. 116, s. 42.

As to payment of estate duty, see Finance Act, 1894, s. 9 (7).

Terminable improvement rent-charges created under the Land Improvement Act, 1864, or similar Acts, were not incumbrances payable under this subs. out of capital money: *Re Knatchbull*, 27 Ch. D. 349, 29 *ib.* 588; but they are now made so payable by the S. L. A., 1887, *infra*. A charge under the Agricultural Holdings (England) Act, 1883, s. 29, made in respect of any improvement thereby authorized is an incumbrance within this subs. Also an annual sum issuing out of tithes for a long term: *Re Esdaile*, *ubi sup.* But a terminable charge, imposed in lieu of tithe rentcharge on land in Ireland, is not: *Re Leinster's Estate*, 23 L. R. Ir. 152.

Incumbrance in this subs. means an incumbrance affecting the land sold, or any other land which is the subject of the settlement: *Re Chaytor*, 25 Ch. D. 651; *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 94-6.

(iii.) In payment for any improvement authorized by this Act:

See s. 25; S. L. A., 1887; S. L. A., 1890, s. 13; Housing of the Working Classes Act, 1890, s. 74 (1) (b) *infra*, ch. vii.

And see *Re Houghton Estate*, 30 Ch. D. 102; *Re Venour's S. E.*, 2 Ch. D. 522; *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252.

A power to make improvements out of income will not prevent the application of capital moneys for that purpose: *Clarke v. Thornton*, 35 Ch. D. 307; *Re Lord Stamford's S. E.*, 56 L. T., 484; *Re Sudbury and Poynton Estates*, 1893, 3 Ch. 74.

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

It has been suggested as a consequence that, on a purchase under this subs., the leasehold interest must vest in the first tenant in tail who attains twenty-one, while the reversion in fee devolves on the issue in tail or next remainderman. But the ordinary trust declared of settled leaseholds is such as will correspond with the uses of the freeholds as nearly as the different tenure and rules of law will allow. The best mode of complying with this trust is to surrender the term,

not to keep it on foot. Further, this trust may properly be treated as making the term attendant on the inheritance of an immediate reversion when purchased, thereby causing the term to cease.

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- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land :

See s. 24, *infra*.

The cases on the Land Clauses Act are not to be applied to this s.:
Re Lord Gerard's S. E., 1893, 3 Ch. 252, 257.

This subs. enables capital money to be applied to commutation of extraordinary tithes (49 & 50 Vict. c. 54, s. 6).

Extraordinary
tithes.

- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes :

Purchases are made by the direction of the tenant for life, if any competent to act. He is the person to contract, and s. 42 frees the trustees from all liability for adopting his contract. They are not bound to inquire as to the propriety of the purchase or answerable for the title, nor for the conveyance if it purports to convey the land in a proper manner.

Subss. vii. and viii. do not apply to capital money arising under settlement by conveyance on trust for sale unless the application is authorized by the settlement : see s. 63 (2) (ii.).

- (ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge :

Under this s. money paid into Court may be paid out to trustees for the purpose of being invested or applied : see S. L. A., 1890, s. 14, which meets the decision in *Cookes v. Cookes*, 34 Ch. D. 498. They are "persons empowered to give an absolute discharge" within ss. 21 (ix.), 40. This principle has been acted on in the case of money in Court under the Lands Clauses Act (*Re Hobson's Trusts*, 7 Ch. D. 708), which only authorizes payment to a person absolutely entitled, and

Payment out
of Court to
trustees.

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—
INVESTMENT
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OF CAPITAL
TRUST MONEY.
—
- does not contain the words "empowered to give an absolute discharge." The authority of *Re Hobson's Trusts* was doubted in *Re Smith* (40 Ch. D. 386), but it was considered clear that the payment out could be made under this Act (presumably under subs. ix. of this s. or s. 32 or both taken together), but it is a discretionary power, and in the particular case the Court declined to order payment on the ground of certain persons not being properly represented. See also: *Re Wootton's Estate*, W. N., 1890, 158. Money will be paid out to trustees of a settlement of property inalienably entailed, *Re Bolton Estates Act*, W. N., 1885, 190.
- Payment to persons having power to appoint. Payment will be made to persons having a joint power of appointment without requiring them to make an appointment: *Re Winstanley*, 54 L. T. 840; W. N., 1886, 92.
- Payment to tenant in tail. And, as to payment to tenant for life and remainderman, jointly, see *Anson v. Potter*, 13 Ch. D. 141.
- Payment to tenant in tail. Payment will not be made to a tenant in tail, he must execute a disentailing assurance: *Re Reynolds*, 3 Ch. D. 61; and it seems file an affidavit of no incumbrances: *Thornhill v. Milbank*, 12 W. R. 523; *Williams v. Ware*, W. N., 1888, 82.
- Sending money abroad. Trustees may be appointed abroad to receive money required to be sent there: *Re Lloyd*, 54 L. T. 643; but see *Re Freeman's Settlement Trusts*, 37 Ch. D. 148.
- Small sums. Application for payment of a sum not exceeding £1000 should be by summons in Chambers: R. S. C., 1883, Or. L V., r. 2 (2). But see *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541. As to sums exceeding that amount, see Ch. VIII., r. 2, note, *infra*.
- For orders under this Act directing payment out to trustees of money paid in on a compulsory purchase, see *Re Wright's Trusts*, 24 Ch. D. 662; *Re Harrop's Trusts*, *ib.* 717; *Re Duke of Rutland's Settlement*, 31 W. R. 947; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576; *Re Wootton's Estate*, *ubi sup.*
- (x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act:
- Costs of sale. As to what costs may be paid under this subs., see *Re Beck*, 24 Ch. D. 608; *Re Jones*, 26 *ib.* 736, 744; *Re Llewellyn*, 37 *ib.* 317; *Re Rudd*, W. N. 1887, 251; and what may not, *Re Rudd*, *ubi sup.*; *Cardigan v. Curzon-Howe*, 40 Ch. D. 338; S. C. on appeal, 41 Ch. D. 375 (costs of tenant for life's incumbrancers); *Re Eyton*, W. N. 1888, 254; *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 89, 90. Costs of an abortive sale were allowed in *Re Smith's S.E.*, 1891, 3 Ch. 65; and see *Re Llewellyn*, *ubi sup.*, where the sale for which the costs were incurred was not effected. Costs on the higher scale were allowed in *Re Chaytor*, 25 Ch. D. 651, 655. As to costs of several persons constituting tenant for life, see *Smith v. Lancaster*, 1894, 3 Ch. 439.
- Tenant for life's charges.
- Abortive sale.

As to the costs of proceedings for the recovery or protection of settled land, see s. 36.

See also ss. 46 (6), 47, *infra*.

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

SS. 21, 22.

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Every investment, or other application of capital money, must be made by the direction of the tenant for life, if any competent to act, (s. 22 (2) (3)), and investments cannot be varied without his consent (*ib.* (4)), and his assignee (if any) must also consent, s. 50 (3) (4). The sale of settled land can no longer be taken in any case to be for the purpose only of investment of the proceeds in the purchase of other land to be settled to the same uses. (See *Mortlock v. Buller*, 10 Ves. 309.)

Direction of
tenant for
life as to
investment.

As to applying proceeds of sale under a power of sale in building, see *Vine v. Raleigh*, 1891, 2 Ch. 13; *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252.

22.—(1.) Capital money arising under this Act shall in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

Regulations
respecting
investment,
devolution,
and income of
securities, &c.

It was decided (*Cookes v. Cookes*, 34 Ch. D. 498), that a tenant for life consenting to the payment of capital money into Court had exercised the option given by this subs., and that the money must remain there and be invested and applied by the Court. But see now S. L. A., 1890, s. 14.

Payment out
to trustees
of money
paid in.

There must be trustees of the settlement in existence: else the option for payment into Court cannot be exercised: *Hatten v. Russell*, 38 Ch. D. 334, 345; *Mogridge v. Clapp*, 1892, 3 Ch. 382.

In *Cardigan v. Curzon-Howe*, 30 Ch. D. 531, money was paid into Court to the credit of an action for execution of the trusts of a settlement.

As to distinction between "investment" and "application," see *Re Duke of Marlborough*, 32 Ch. D. 1, 5, 6, 10.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by

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 —
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 TRUST MONEY.
 —

the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

As to the regard to be paid, by the trustees or by the Court, to the directions of the tenant for life, for purposes of subs. 2, 3, and 4: see *Clarke v. Thornton*, 35 Ch. D. 307.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

Whether
 capital money
 is equitably
 converted.

This subs. is a statutory direction that capital money arising under the Act shall devolve as land, but there are no express words operating to create the ordinary equitable conversion into land by directing the money to be laid out in the purchase of land to be settled. The land having been sold, the proceeds necessarily, by operation of the general principle of equity, become liable to be re-invested in land of the same kind to be settled in like manner as the land sold, and this subs. is merely supplementary to that general principle. If, for instance, the land sold were leasehold, the proceeds continue liable to vest in the first tenant in tail who attains twenty-one, unless and until invested in the purchase of fee simple land, by which the line of devolution would be changed. This view is in accordance with the case of *Re Duke of Marlborough*, 32 Ch. D. 11, 13, in which it was held that the proceeds of the sale of heir-looms, notwithstanding s. 37 (2), retained their original quality and were personal estate until invested in land. The point is of importance in framing settlements of money to be invested in land. If a direction that the money shall "be held and applied as capital money arising under the Settled Land Act from the settled land," does not operate as an equitable conversion into land, then it merely makes the money devolve as land as nearly as the law permits,

Proceeds of
 heir-looms.

and the money will vest absolutely in the first tenant in tail unless a clause is added expressly directing an investment in the purchase of land. By statute only, but not by trust or contract, money may be made to devolve as land though not equitably converted. If there is an equitable conversion the money is in equity entailed land, and the absolute interest can only be acquired by a bar of the entail: compare *Hyett v. Meekin*, 25 Ch. D. 735; *A. G., v. Marq. of Ailesbury*, 12 App. Ca. 672.

SS. 22, 23, 24.

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TRUST MONEY.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

The capital money to be invested or applied under this s. is the residue (if any) after payment of claims properly payable thereout under s. 21.

The consent of the assignee of the tenant for life is necessary to the investment or application: see s. 50 (3).

As to capital money arising from sale of a lease or other estate or interest less than the fee simple, or of a reversion, see s. 34.

See, for form of summons for payment into Court under this s., Forms IX.-XI., Chap. VIII., *infra*; and Forms of Orders: Seton (5th ed.), 1517, 1521, 1523.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Investment
in land in
England.

England includes Wales and Berwick-on-Tweed in Acts of Parliament (20 Geo. 2, c. 42, s. 3), but not in deeds or other documents.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

Settlement
of land
purchased,
taken in
exchange, &c.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

S. 24.

INVESTMENT
OR OTHER
APPLICATION
OF CAPITAL
TRUST MONEY.

Estates not
capable of
creation by
settlement.

See, on this subs., *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 93.

Where the money arises from an estate inalienably entailed (see s. 58 (1) (i.)), or from an estate where the tenant in tail in remainder has barred his estate tail and converted it into a base fee, there seems no doubt that this subs. gives a statutory authority to create the corresponding inalienable estate tail or base fee in land purchased with the proceeds of sale; and see *Re Bolton Estates Act*, W.N. 1885, 90. The same point arises under the Lands Clauses Consolidation Act, 1845, s. 69.

As to increase of charges, see *Hindle v. Taylor*, 5 De G. M. & G. 577.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions, to, on, and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

The last words of this subs. are the usual words in the common form, but were not contained in the corresponding clause in Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 4). Their absence made that clause objectionable, the vesting being merely negatived, so that on the death under age of the first tenant in tail, he was simply excluded, and the leaseholds reverted to the settlor: *Gosling v. Gosling*, 1 De G. J. & S. 16; *Christie v. Gosling*, L. R., 1 H. L. 279; 1 Jarm. Wills, 237, n. (b), 5th ed. The last words of this subs. carry the leaseholds with the freeholds to the next issue in tail or the next tenant in tail by purchase if he attains twenty-one, and if not, through all tenants in tail by purchase till one does attain that age.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

See note to s. 5.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

See *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 93; & S. L. A., 1890, s. 11.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

SS. 24, 25.

INVESTMENT
OR OTHER
APPLICATION
OF CAPITAL
TRUST MONEY.

VII.—IMPROVEMENTS.

Improvements with Capital Trust Money.

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

As to the effect of the specific enumeration, in this s., of authorized improvements, in excluding from the jurisdiction under this Act, matters included in the jurisdiction under the Lands Clauses Act or the general jurisdiction, see *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252.

As to the guidance it gives the Court in the exercise of its general jurisdiction, see *Re De Teissier's S. E.*, 1893, 1 Ch. 153, 165.

IMPROVE-
MENTS.

*Improvements
with Capital
Trust Money.*

Description of
improvements
authorized by
Act.

S. 25.

IMPROVE-
MENTS.*Improvements
with Capital
Trust Money.*Cases on im-
provements.

As to what improvements are, or are not, authorized under this s. and S. L. A., 1890, s. 13, *infra*, see (a) *Re Houghton*, (but qy. if this decision was not under the general jurisdiction, as to which see (g) *infra*), 30 Ch. D. 102; (b) *Re Bethlehem & Bridewell Hospitals*, *ib.* 541; (c) *Re Duke of Marlborough's Settlement*, 8 T. L. R. 201; (d) *Re Newton's S. E.*, W. N. 1889, 201; *ib.* 1890, 24; (e) *Re Mundy's S. E.*, 1891, 1 Ch. 399; (f) *Re Millard's S. E.*, 1893, 3 Ch. 119; (g) *Re Lord Gerard's S. E.*, *ib.* 252; (h) *Re Walker's S. E.*, 1894, 1 Ch. 189; (i) *Re Gaskell's S. E.*, *ib.* 485; (j) *Re Orwell Park Estate*, W. N. 1894, 135.

The following improvements appear to be authorized under the above cases.

[*Note*.—The Roman numerals refer to the subss. of s. 25, and the letters to the above cited cases.]

- (1.) Drainage for mansion: (a); (i.); (iii.); (xviii.).
- (2.) Sea walls, to improve land for building purposes: (b); (iv.).
- (3.) Roads for prospective building estate: (f); (viii.).
- (4.) Cottages: (a); (d); (x.).
- (5.) Building Agent's house, in the nature of a farm house: (a); (g); (x.); (xi.).
- (6.) Re-roofing farm house: (d); (xi.).
- (7.) Water supply for mansion, and for building estate: (a); (j); (xiii.).
- (8.) Sewers for prospective building estate: (f); (xviii.).
- (9.) Erection of engine and pumps for open mines: (e); (xix.); (xx.).
- S. L. A., 1890. (10.) Re-arrangement of main entrance to house; (i); S. L. A., 1890, s. 13 (ii.), *infra*.
- (11.) Re-roofing of house, where old roof was worn out: (i); S. L. A., 1890, s. 13 (ii.), *infra*.
- (12.) Re-construction of mansion, part of which was unaltered, and part utilised: (h); S. L. A., 1890, s. 13 (iv.), *infra*.

The following improvements appear to be unauthorized.

- (1.) Re-roofing, not being a permanent improvement: (d); (xi.).
- (2.) Re-construction of stone wall fences dividing fields: (e); (xi.); (xx.).
- (3.) Roman Catholic Chapel: (g).
- S. L. A., 1890. (4.) Residential house for land agent: (g); S. L. A., 1890, s. 13 (ii.), *infra*.
- (5.) Heating apparatus for mansion: (i); S. L. A., 1890, s. 13 (ii.), *infra*.
- (6.) New stables for mansion, where original stables were in fair repair: (g); S. L. A., 1890, s. 13 (iv.), *infra*; but see (a).
- (7.) Architectural improvements of mansion: (g); S. L. A., 1890, s. 13 (iv.), *infra*; and see note to s. 21 (vii.), *supra*.

46 & 47 Vict.
c. 61.

By the Agricultural Holdings (England) Act, 1883, s. 29, it is enacted as follows:—

29. . . "Capital money arising under the S. L. A., 1882, may be

applied in payment of any moneys expended, and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the schedule hereto, as for an improvement authorized by the said S. L. A."

The schedule referred to is as follows:—

SS. 25, 26.

IMPROVE-
MENTS.

*Improvements
with Capital
Trust Money.*

PART I.

Improvements to which consent of landlord is required.

- (1.) Erection or enlargement of buildings.
- (2.) Formation of silos.
- (3.) Laying down of permanent pasture.
- (4.) Making and planting of osier-beds.
- (5.) Making of water meadows or works of irrigation.
- (6.) Making of gardens.
- (7.) Making or improving of roads or bridges.
- (8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water-power, or for supply of water for agricultural or domestic purposes.
- (9.) Making of fences.
- (10.) Planting of hops.
- (11.) Planting of orchards or fruit bushes.
- (12.) Reclaiming of waste land.
- (13.) Warping of land.
- (14.) Embankment and sluices against floods.

PART II.

Improvement in respect of which notice to landlord is required.

- (15.) Drainage.

S. 31 (v.) of this Act (S. L. A.) enables a tenant for life to make binding contracts in regard to improvements authorized by it.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

Approval by
Land Commis-
sioners of
scheme
and payment
thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

- (i.) A certificate of the Land Commissioners certifying

S. 26.

IMPROVE-
MENTS.*Improvements
with Capital
Trust Money.*

that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

The Land Commissioners are now the Board of Agriculture: see Board of Agriculture Act, 1889, s. 2.

This s. gives the tenant for life a choice of three modes in which he may obtain a sanction to expenditure, so as to enable the amount to be paid out of capital, and so as to free the trustees from responsibility if the payment is to be made by them. A certificate of (1) the Land Commissioners, or (2) a competent engineer or able practical surveyor that the work has been properly executed, and what amount is payable, or (3) an order of the Court authorizing payment. Under any of these three authorities trustees will be safe in paying the amount mentioned in the certificate or order to the tenant for life, or as he may direct, he being the person who procures the execution of the work.

Prospective
order.

An order will not be made under subs. (2.) (iii.) unless capital moneys are actually in hand: *Re Millard's S. E.*, 1893, 3 Ch. 116; disapproving *Re Houghton*, 30 Ch. D. 41; see also, *Re Marquis of Bristol's S. E.*, 1893, 3 Ch. 161.

The result of this s. seems to be that where capital money is in the hands of trustees, any scheme for its application in improvements must be approved by them; but if they refuse s. 44 appears to give an appeal to the Court. If the money is in Court then by subs. 3 the scheme must be approved by the Court. Formerly it had to be approved before the works were commenced: *Re Hotchkin*, 35 Ch. D. 41; *Re Broadwater Estate*, 33 W. R. 738; but see now S. L. A., 1890, s. 15, *infra*. Extra expenditure incidental to the scheme was allowed in *Re Lytton*, 38 Ch. D. 20. Whether the cost of improvements on lands sold can be paid after sale seems doubtful: *Re Hotchkin*, 35 Ch. D. 41; compare *Re Howard's S. E.*, 1892, 2 Ch. 233, 243.

The Court will not hear counsel for the trustees in support of an application by the tenant for life whose interest is opposed to that of the remainderman: *Re Hotchkin*, *ubi sup.*; *Re Broadwater Estate*, 33 W. R. 738; but trustees taking different sides were heard and allowed separate costs in *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 548. As to costs of scheme, see *Re Lord Stamford's S. E.*, 43 Ch. D. 84, 97. Where there are no trustees and the tenant in tail, who is before the Court, does not require them to be appointed, the Court will act under this s. without them, and, in acting, will pay regard to the wishes of the tenant for life: *Clarke v. Thornton*, 35 Ch. D. 316.

This s. is not retrospective: *Re Knatchbull's S. E.*, 27 Ch. D. 349; 29 *ib.* 588.

For forms of summonses under this s. see Forms XII., XIII., XV., and XVI., Chap. VIII., *infra*, and for the nomination of an engineer or surveyor see Form XIV.; and of Orders, Seton (5th ed.), 1527, 1528.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

See *Re Orwell Park Estate*, W. N., 1894, 135.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

SS. 26, 27, 28.

IMPROVEMENTS.

Improvements with Capital Trust Money.

Approval of scheme.

Extra cost.

Payment after sale.

Not retrospective.

Concurrence in improvements.

Obligation on tenant for life and successors to maintain, insure, &c.

SS. 28, 29.

IMPROVE-
MENTS.*Improvements
with Capital
Trust Money.*

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

See S. L. A., 1887, s. 2.

*Execution and
Repair of
Improvements.*

Protection as
regards waste
in execution
and repair of
improvements.

Execution and Repair of Improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any

remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Compare the Improvement of Land Act, 1864, ss. 32-34; and the Agricultural Holdings (England) Act, 1883, ss. 41, 42.

But for this s., an equitable tenant for life (see *Taylor v. Taylor*, 20 Eq. 297; *Re Wythes*, 1893, 2 Ch. 369; *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297) would not be free to enter and execute improvements. Also, the improvements might be such as, apart from the s., a tenant for life impeachable for waste could not execute.

SS. 29, 30, 31.

IMPROVE- MENTS.

*Improvements
with Capital
Trust Money.*

Improvement of Land Act, 1864.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

*Improvement
of Land Act,
1864.*

*Extension of
27 & 28 Vict.
c. 114, s. 9.*

See *Re Newton's S. E.*, W. N., 1889, 201; 1890, 24.

Where improvements authorized by the Improvement of Land Act, 1864, are not within the S. L. A., capital moneys are not applicable thereto under the S. L. A.: *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252, 257.

VIII.—CONTRACTS.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

CONTRACTS.

*Power for
tenant for life
to enter into
contracts.*

In this s. enfranchisement is not mentioned. It is included in the term sale by force of s. 3 (ii.), which authorizes the tenant for life "to sell, &c., so as to effect an enfranchisement." See also subs. (vi.), *infra*.

For regulations respecting sales, &c., see s. 4.

s. 31.

CONTRACTS.

- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

See also s. 12, *suprà*.

The consideration paid under this subs. for varying the terms of a lease would be income: see *Earl Cowley v. Wellesley*, L. R. 1 Eq. 660.

- (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

As to the terms on which a tenant for life may accept a surrender of a lease, see s. 13.

- (v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and
- (vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

Contracts.

Under this subs. a tenant for life may contract, and, where competent to act, he is the proper person to contract, as well as to direct investments of capital money. By s. 42 the trustees are freed from all responsibility in adopting any such contract.

As to notice of the contract under s. 45, see *Duke of Marlborough v. Sartoris*, 32 Ch. D. 616; *Hughes v. Fanagan*, 30 L. R. Ir. 111.

S. 31.

CONTRACTS.

Notice to S. L.
A. trustees.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself.

Compare *Davis v. Harford*, 22 Ch. D. 128.

S. 6 of S. L. A., 1890, extends the power to perform contracts to contracts having priority to the settlement.

Contracts prior
to settlement.

(3.) The Court may on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying or rescinding thereof.

As to the jurisdiction under this subs. over third parties, see *Re Ailesbury S. E.*, 42 W. R. 45.

Jurisdiction-
parties.

For form of application under this subs. see Form XVII. Chap. VIII., *infra*; and for form of Order, see Seton, 5th ed., p. 1521.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

The contract under this Act of a tenant in tail has the same effect as that of a tenant for life (see s. 58 (1) (i.)) and binds the successor, notwithstanding that the ordinary contracts of a tenant in tail do not so bind. The ordinary contract if binding would defeat the successor's title in like manner as the contract of an owner in fee simple (see *Davis v. Harford*, *ubi sup.*), but under this Act the contract enures for the benefit of the successor.

Contracts by
tenant in tail.

This s. renders an intending purchaser or lessee or other person contracting with the tenant for life under the powers given by the Act, perfectly safe as regards performance of the contract. Every successor of the contracting tenant for life will be bound and liable to perform the contract in the same way as that tenant for life himself: but a contract which does not comply with the requirements of the Act is of course no more binding than a completed transaction which does not: see s. 55 (3) *infra*, & *Hughes v. Fanagan*, 30 L. R. Ir. 111.

SS. 31, 32.

CONTRACTS.

For a form of summons for liberty to enforce a contract under this s., see Form XVII. Chap. VIII., *infra*; and for forms of Orders, Seton (5th ed.), 1506, 1521.

MISCELLANEOUS PROVISIONS.

Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18, 23 & 24 Vict. c. 106, 32 & 33 Vict. c. 18, 40 & 41 Vict. c. 18.

Costs of application or investment of money in Court.

Payment out to S. L. A. trustees.

Examination of married woman.

IX.—MISCELLANEOUS PROVISIONS.

32. Where under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

Money in Court arising from sale of land inalienably entailed by Statute was ordered to be paid to trustees who had been appointed under s. 38: *Re Bolton Estates Act*, W. N., 1885, 90; 52 L. T. 728.

This s. enables money in Court under the Lands Clauses Acts and other similar Acts to be applied in like manner as money arising from a sale under this Act. The company by whom the money is paid in will be liable to pay the costs of the application and of the disposal of the money in like manner as they are liable to pay the cost of reinvestment in land or of any other disposal of the money authorized by the Act under which the money is paid in, including an investment in debenture stock under s. 21 of this Act: *Hanbury's Trusts*, 31 W. R. 784; W. N., 1883, 116; and are also liable to pay the costs of a petition to amend a scheme for expenditure upon improvements: *Re Sanders*, 38 Sol. J. 478; and purchase-money paid into Court under the Lands Clauses Act may be paid out to the trustees of the settlement: see note to s. 21 (ix.).

Notwithstanding this s. Kay, J., would not dispense with the examination of a married woman on an application under s. 50 of the S. E. A.: *Re Arabin's Trusts*, W. N., 1885, 90; but see *Re Ward's S. E.*, W. N., 1895, 41. But no examination is necessary where she

comes within the M. W. P. A. : *Riddell v. Errington*, 26 Ch. D. 220 ; *Re Harris*, 28 *ib.* 171.

SS. 32, 33.

In the case of *Byron's Charity*, 23 Ch. D. 171 (followed in *Re Bethlehem & Bridewell Hospitals*, 30 Ch. D. 541, where however the only question discussed was costs, and in *Ex parte, Jesus College, Cambridge*, W. N., 1884, 37 ; 32 W. R. 115), it was held that the proceeds of the sale of charity land paid into Court under the Lands Clauses Act were within this s., and might be invested as authorized by s. 21 (i.). It is difficult to see how this decision can be correct. The money in Court must, in order to be within this s., be not merely money liable to be laid out in the purchase of land generally, but in the purchase of "land to be made subject to a settlement." A trust deed of charity land is in no sense a settlement within the meaning of s. 2 (1) of this Act. The argument seems to have been that the money was settled within the meaning of s. 69 of the Lands Clauses Act, but no money is within this Act unless representing land settled within the meaning of this Act ; however, in *Ex parte Vicar of Castle-Bytham*, 1895, 1 Ch. 348, it was held, on the authority of the above cases, that, although the settlement was not within s. 2 (1.) of this Act, the Court had jurisdiction to apply capital money under this s.

MISCELLANEOUS PROVISIONS.

Proceeds of charity land.

Where under a private Act purchase money was paid into Court, the Court appointed new trustees for the purposes of this Act in place of trustees, under a will of the land sold, who retired, and the money was directed to be paid out to the new trustees : *Wright's Trusts*, 24 Ch. D. 662 ; and see *Harrop's Trusts*, 24 Ch. D. 717.

Payment out to trustees.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Application of money in hands of trustees under powers of settlement.

A sinking fund created by the settlement for repayment of moneys raised for improvements is within this s. : *Re Sudbury Estates*, 1893, 3 Ch. 74.

Sinking fund.

This s. should be read with s. 60, *infra* ; the trustees will have discretion during a minority : *Re Duke of Newcastle*, 24 Ch. D. 129, 139 ; and as to powers independent of the Act, see S. C.

"Option" during minority.

"In the hands of trustees" ; the s. applies, though the money be in fact in Court : *Clarke v. Thornton*, 35 Ch. D. 306, 314 ; and see *Pyne v. Phillips*, W. N., 1895, 8.

Money in Court.

"Liable," *i.e.*, under a positive direction : not under a mere power, like the common power, in a money settlement, to purchase a residence, or to invest in purchase of land.

"Liable" to be laid out.

This s. makes the powers given by the Act, as to disposal of capital

SS. 33, 34.

MISCEL-
LANEOUS
PROVISIONS.

Money
bequeathed to
be invested in
land.

money, applicable to all money in the hands of trustees liable to be laid out in land, whether before or after the commencement of the Act; and though s. 2 (1) defines "settlement" as an instrument by which "land stands limited," &c., it is not material that the money did not arise from the sale of land, but was money originally bequeathed in trust to be laid out in the purchase of land to be settled (*Mackenzie's Trusts*, 23 Ch. D. 750; *Re Mundy's S. E.*, 1891, 1 Ch. 399; see also *Re Byng's S. E.*, 1892, 2 Ch. 219). This seems in accordance with the old rule that money liable to be laid out in the purchase of land is to be considered as land, therefore a settlement of the money in this manner is to be considered as a settlement of land. The purchase of land may be deferred, and an interim investment made under s. 21 (i.): *Re Maberly*, 33 Ch. D. 455; even in the case of money bequeathed on trust for immediate investment in land: *Re Mackenzie's Trusts*, 23 *ib.* 750; *Re Tennant*, 40 Ch. D. 594 (in which latter case there had been an order made for investment in Consols until the money could be invested under S. E. A., s. 34).

The effect of this s. is to free all money liable to investment in land from any particular restriction as to the land to be purchased, as, for instance, that it should be in a particular county. The power of investment in land is enlarged as well as the power of interim investment or other application (s. 21).

Application of
money paid
for lease or
reversion.

34. Where capital money arising under this Act is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such a manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

Where a tenant for life is entitled to the rent of leaseholds for a short term he would be injured by a sale if he only received the income of the proceeds, and where the reversion on a lease is sold he may be benefited. This s. provides for the adjustment of the rights

of the tenant for life and remainderman notwithstanding the sale. (See on this s., *Griffith's Will*, 49 L. T. 161.)

This s. is only put in force either on an application by the trustees or some person interested, or, as to money in Court, when the Court is asked to deal with the money, or income. The trustees are not bound to take any proceeding to prevent a tenant for life taking the whole income of the proceeds of a reversion (see s. 42). But upon a sale of a freehold reversion with ground rents, the proceeds being invested by the trustees in leaseholds, thereby increasing the income of the tenant for life; and the trustees on the application of the remainderman, being willing to exercise their discretion, *Chitty, J.*, held, that the Court had jurisdiction under this s.: *Re Bowyers' S.E.*, W. N., 1892, 48. The s. does not seem to apply where the fee simple in possession is sold, and the proceeds invested in leaseholds, s. 21 (viii.); but the transaction might be such as to come under s. 53.

For the principle on which apportionment of the purchase-money and income between tenant for life and remainderman is made on a sale of leaseholds for years, see *Re Phillips*, 6 Eq. 250; *Seton* (5th ed.), p. 2031; *Askew v. Woodhead*, 14 Ch. D. 27; *Re Hunt's Estate*, W. N., 1884, 181; and of reversions on leases, see *Re Wootton's Estate*, L. R. 1 Eq. 589; *Re Mette's Estate*, *ib.* 7 Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell v. Cottrell*, 28 *ib.* 628; *Re Griffith's Will*, 49 L. T. 161; *Re Bowyers' S. E.*, *ubi supra*. On the sale of renewable leaseholds no apportionment was made in *Re Barber*, 18 Ch. D. 624, and the cases there followed. As to apportionment of money paid for minerals severed by a stranger, see *Re Barrington*, 33 Ch. D. 523; *Re Robinson*, 1891, 3 Ch. 129.

For a form of summons for the application of money paid into Court on the sale of a lease or reversion, see Form XVIII. Chap. VIII., *infra*; and of Order, *Seton* (5th ed.), 1523. As to service of the application, see r. 4, Chap. VIII.

For the bearing of this s. on the case of a sale by a tenant for life who has incumbered his life estate to the full value, see *Re Sebright's S. E.*, 33 Ch. D. 429, 440.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Compare s. 28 (2), *supra*.

SS. 34, 35.

MISCELLANEOUS PROVISIONS.

Operative only when enforced.

Apportionment between successive owners.

Cutting and sale of timber, and part of proceeds to be set aside.

SS. 35, 36.

MISCELLANEOUS
PROVISIONS."Timber
estates."

See *Duke of Newcastle's Estates*, 31 W. R. 782, W. N., 1883, 99.

Before this Act it was necessary for a tenant for life impeachable for waste to commence an action in order to have ripe timber cut under the direction of the Court; but see as to his rights in the case of a "timber estate," *Dashwood v. Magniac*, 1891, 3 Ch. 306. The course was to invest the whole proceeds, and give him no part of the capital, but only the income. This s. following the principle as to mineral rents (see s. 11) gives him one-fourth of the capital.

This s. does not enable a tenant for life who is entitled to cut and sell timber for his own use, to receive for his own use the valuation price of uncut timber sold with the estate under this Act: *Re Llewellyn*, 37 Ch. D. 317; and see *Cockerell v. Cholmeley*, 1 Clark & Fin. 60.

For forms of summonses under this s. see Forms VI. and VII., Chap. VIII., *infra*; and for forms of Orders, Seton (5th ed.), 1519, 1521.

Proceedings for
protection or
recovery of
land settled
or claimed as
settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

See also s. 47, *infra*.

Before this Act, and subject to S. E. A. s. 17 (see *Re Willan's S. E.*, 45 L. T. 745), the whole cost of defending or bringing actions of ejectment in respect of settled land, or preserving property from deterioration by a nuisance on adjoining land, such as a sewage farm, fell on the tenant for life. Where there was money in Court liable to be laid out in land, the Court often repaid the tenant for life the cost incurred by him, but the Court had no jurisdiction to charge the land: see *Re Ormrod's S. E.*, 1892, 2 Ch. 318, 325. This s. gives the power. It replaces and supplements S. E. A., s. 17, now repealed (see schedule to this Act).

In *Re Jones*, 31 W. R. 399, the Court sanctioned the raising of money for discharging the costs of an action by an infant tenant in tail for the benefit of the settled estates: and see *Re Llewellyn*, 37 Ch. D. 317. In *Stanford v. Roberts*, 52 L. J. Ch. 50, where there were legal limitations in favour of the plaintiff for life with remainder to an infant tenant in tail, the Court refused to order payment out of the estate of the costs of an Act to enable a sale, whether the application succeeded or not, following *Dunne v. Dunne*, 7 D. M. & G. 207, 213, but sanctioned an application for the Act, the tenant for life paying the costs unless the Act directed otherwise. In such a case the Court has no power to charge the land.

Proceedings in the House of Lords to establish a claim to a Peerage carrying with it the title to land, are within this s.: *Re Earl of Aylesford*, 32 Ch. D. 162; see also on this s. *Re Twyford Abbey S. E.*, 30 W. R. 268; *More v. More*, 37 *ib.* 414; *Re Earl De la Warr's S. E.* 16 Ch. D. 587; *Re Navan & Kingscourt Ry. Co.*, 21 L. R. Ir. 369.

SS. 36, 37.

MISCELLANEOUS PROVISIONS.

As to the powers of the Court in Lunacy in relation to this s., see *Lunacy. Re Blake*, 39 Sol. J., 330, & s. 62, *infra*.

For form of order authorizing costs mentioned in this s., see Seton (5th ed.), 1529.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them. Heirlooms.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

The Court had no jurisdiction to sell heirlooms simply on the ground of convenience: *D'Eyncourt v. Gregory*, 3 Ch. D. 635.

Sales of heirlooms were ordered under this s. in *Re Brown*, 27 Ch. D. 179; *Re Houghton*, 30 *ib.* 102; *Re Duke of Marlborough*, *ib.* 128; 32 *ib.* 1; *Re Rivett-Carnac*, 30 *ib.* 136; *Browne v. Collins*, W. N., 1890, 78; *Re Earl of Radnor's Will*, 45 Ch. D. 402; but refused in *Re Beaumont*, 58 L. T. 916; *Re Hope's Settlement*, 9 T. L. R. 506. Sales of heirlooms.

An order, to sanction the sale of heirlooms already sold, will not be made; *Re Ames*, 1893, 2 Ch. 479; but in that case the Court, on the ground that the sale was advantageous, directed the trustees not to take steps for their recovery. Ex post facto order.

It is conceived that where heirlooms are indefeasibly vested in a tenant in tail, subject only to some preceding life interest or interests, the powers of this s. do not come to an end; see, however, *Re Duke of Marlborough*, 30 Ch. D. 127, at p. 134; 32 *ib.* 1, at p. 11. The Court would certainly, however, in giving its sanction under the s., pay Tenant in tail indefeasibly entitled.

SS. 37, 38.

MISCEL-
LANEOUS
PROVISIONS.

Title of
honour.

Trustees under
this s.

regard to his interest in remainder: see S. C., and *Re Earl of Radnor's Will*, *ubi sup.*

A dignity or title of honour descending to the heirs general or the heirs of the body, being an incorporeal hereditament, is "land" within the meaning of this s., so that heirlooms settled to go along with it can be sold: *Re Rivett-Carnac*, 30 Ch. D. 136.

A trustee with power of sale of land is a trustee for the purposes of this s.: *Constable v. Constable*, 32 Ch. D. 233.

Incumbrances discharged out of the proceeds of heirlooms need not be kept on foot for the benefit of an infant remainderman in whom the heirlooms, if not sold, would have vested at twenty-one: *Re Duke of Marlborough*, *ubi sup.*

For forms of summons under this s. see Forms VI. and VII., Chap. VIII., *infra*; and of Orders, Seton (5th ed.), 1519-20.

TRUSTEES.

Appointment
of trustees by
Court.

X.—TRUSTEES.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act, become and be the trustees or trustee of the settlement.

This s. must be read with S. L. A., 1890, s. 16.

See also s. 60, *infra*, and T. A., s. 47.

Trustees for
purposes of
the Act.

The settlement, if made before this Act, may give to trustees a power of, or trust for, sale, falling within the requirements of this Act, or of S. L. A., 1890, and then they, or their successors in office, will be trustees for the purposes of the S. L. A.'s. No others will be trustees for those purposes. The settlement, if made after the Act, may contain a similar power or trust, or may declare certain persons

trustees for the purposes of the Act. The trustees in all these cases will be trustees for the purposes of the Acts (s. 2 (8)), and being trustees of the settlement the tenant for life, if power is given to him for the purpose, can appoint new trustees. As to the appointment of new trustees, see T. A., ss. 10, 47. If these trustees, whether original or substituted, are willing to assist the tenant for life in putting in force the powers of this Act, an application to the Court under this s. is unnecessary. But if they refuse to assist, or if there are no trustees, an application to the Court for the appointment of trustees is necessary, and it is conceived that the Court would require the refusing trustees, if any, to be served (see s. 46 (5)). It is proper in the interest of remaindermen not to allow the tenant for life to appoint trustees for the purposes of the Act unless empowered to do so by the settlement. The tenant for life having full power to sell without any sanction by the Court, it is conceived that the Court will in every case appoint trustees on an application by the tenant for life where there are refusing trustees as well as where there are no trustees; except perhaps where the Court is satisfied that a sale is impossible: *Williams v. Jenkins*, W. N., 1894, 176. The only duty of the Court will be to see that the persons to be appointed are fit and proper persons.

S. 38.
TRUSTEES.

There must be at least two trustees unless the settlement authorizes one alone to receive capital money (see ss. 39 and 45 (2)). Where in a settlement before the Act the power of sale is given to the survivor of two or more trustees this will be a sufficient authority: *Garnett Orme & Hargreaves' Contract*, 25 Ch. D. 595; 32 W. R. 313, as to which case see note to s. 45. In a settlement made after the Act there should, if so desired, be not only an express authority to a sole trustee to act generally for the purposes of the Act, but also an express authority to him to receive capital money arising under the Act.

Number of
trustees.

Single trustee.

Trustees, for purposes of the Act, of settled land in England, and resident there, were appointed, by the Irish Court, trustees for purposes of the Act, of Irish land, settled on the same limitations: *Re Maberly's S. E.*, 19 L. R. Ir. 341.

In Ireland trustees were appointed under this s. to enable a sale, where the trustees of the settlement had a power of sale, subject to the consent, not obtainable, of a person other than the tenant for life: *Re Johnstone's Settlement*, 17 L. R. Ir. 172.

A tenant for life may propose for appointment other persons than the original trustees of a will: *Re Nicholas*, W. N., 1894, 165.

The Court will not appoint the tenant for life, or a person who might become tenant for life, to be trustee: *Harrop's Trust*, 24 Ch. D. 717, 719; but see *Tempest v. Camoys*, W. N., 1888, 17; nor his solicitor: *Wheelwright v. Walker*, 23 Ch. D. 763, though he was so appointed by the settlement: *Re Kemp*, 24 Ch. D. 485; but see *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 2 Ch. 360; nor two persons nearly related to each other: *Re Knowles*, 27 Ch. D. 707; nor (in Ireland) make any appointment unless satisfied that it is

Who not
appointed
trustee.

SS. 38, 39, 40. beneficial to all persons interested: *semble*, *Burke v. Gore*, 13 L. R. Ir. 367. But the Act seems to have been construed in a rather more confined manner in Ireland than in England.

TRUSTEES.

Application,
how made.

As to application for the appointment of trustees and service of the application, see Chap. VIII., *infra*, and for form of summons see *ib.* Form XIX. rr. 2, 4.

In a proper case, the summons will be ordered to be served on the remainderman, or his assignee: *Wheelwright v. Walker*, *ubi supra*.

For Forms of Orders: see Seton (5th ed.), 1512-13, 1515.

And as to the effect of a pending suit relating to the settlement on the power given by this s., see *Re Parry*, W. N., 1884, 43; *Cardigan v. Curzon-Howe*, 30 Ch. D. 539.

Stamp on
appointment.

The Commissioners of Inland Revenue do not require that an appointment of trustees under this s. should bear a 10s. stamp where there had previously been no trustee for the purposes of the Act: *Re Potter*, W. N., 1889, 69; but see *Re Kennaway*, *ib.* 70.

Number of
trustees to
act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

In the case of settlements executed before this Act but after the Act 23 & 24 Vict. c. 145, there may not be an express clause authorizing a surviving or sole trustee to give a receipt, but that Act as to settlements to which it applies, and T. A., s. 20, re-enacting C. A., 1881, s. 36, as to all settlements, supplies the clause where a sole trustee is authorized to sell and brings the case within this s.: *Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595, as to which see note to s. 45.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

This s. follows the practice of the Court, which does not usually pay out money to a single trustee.

Representa-
tive of sur-
viving trustee.

It is conceived that the prohibition against paying to fewer than two applies to the case of a sole personal representative of a surviving trustee (see s. 38 (2)), so that a sole executor or administrator could not give a discharge. The word "representative" in the singular in the next s. applies to the case where the settlement authorizes a sole trustee to act.

Trustees'
receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one

trustee, or of the personal representatives or representative of the last surviving or continuing trustee for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

SS. 40, 41, 42.

TRUSTEES.

See *Pyne v. Phillips*, W. N., 1895, 98.

See note to last s. as to the meaning of "representative" in the singular.

This power to give receipts necessarily applies to trustees appointed by the Court under s. 38 (*Cookes v. Cookes*, 34 Ch. D. 498), otherwise no sale could be made except on payment into Court.

As to receipts by agents, see T. A., s. 17.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Protection of each trustee individually.

Compare T. A., s. 24.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are

Protection of trustees generally.

- SS. 42, 43, 44. not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

TRUSTEES.

The result of the two last preceding ss. seems to be that trustees are free from all responsibility of any kind except to take care of the money paid to them and to see that the investment or application under s. 21 (i.), (ii.), (iii.), (ix.), (x.), and (xi.), of money in their hands is proper (see also *Hatten v. Russell*, 38 Ch. D. 334, 344). When the money is to be re-invested in land they are expressly exempted from any responsibility as to the propriety of the purchase, the validity of the title, or the form of conveyance if it purports to convey the land in the proper mode. In parting with the purchase-money they have only to see that they pay it, by direction of the tenant for life, to some person who appears to join in the conveyance for some necessary or proper purpose. There ought, therefore, to be no difficulty in procuring trustees for the purposes of the Act. As to a conveyance "in the mode" referred to in this s., see s. 24.

Trustees' reimbursement.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Compare T. A., s. 24.

Reference of differences to Court.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

See also s. 46 (6), *infra*, and *n.* thereto.

As to the nature of the differences included in this s., see *Wheelwright v. Walker*, 23 Ch. D. 762; *Hatten v. Russell*, 38 *ib.* 344.

For form of summons for a declaration under this s., see Form XX., Chap. VIII., *infra*; and as to service of the summons, r. 4, *ib.*

45.—(1.) A tenant for life when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

S. 45.
 TRUSTEES.
 Notice to
 trustees.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

This s. must be read with S. L. A., 1884, s. 5; and S. L. A., 1890, s. 7 (i.).

By S. L. A., 1884, s. 5 (which cancels the decision *Re Ray*, 25 Ch. D. 464), the notice may be in general terms except as to a mortgage or charge, and may be waived by a trustee. Notice once given will it is conceived continue in force during the whole life of the tenant for life giving it.

47 & 48 Vict.
 c. 18, s. 5.
 General notice.

"Month" means calendar month: see *n. to C. A.*, s. 2.

Posting is sufficient notice, whether the letter is received or not: *Household Fire Insurance Company v. Grant*, 4 Ex. D. 216.

It is conceived that this s., especially subs. 2, must be read in connection with s. 39 (2). It is obvious that in settlements before the Act there can be no clause expressly excluding this subs., and that the exclusion (if any) must be by necessary implication. (A remark by Pearson, J., in *Lawrence v. Lawrence*, 26 Ch. D. 795, 800—a case on the Apportionment Act of 1870—shows how an instrument can, by implication, control the provisions of an Act passed subsequently to its execution.) Accordingly in *Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595, an authority to pay money to a surviving trustee was considered by Bacon, V.-C., "a contrary intention" within the meaning of this subs. It is understood that the correctness of this

S. 45.	construction has been questioned by a judge in Chambers, but many titles must have been accepted on the faith of its correctness.
TRUSTEES.	Where trustees are selling on behalf of an infant under s. 60, it is not necessary for them to give notice under s. 45 to themselves or their solicitor; they are not the tenant for life, they are merely trustees exercising the powers of the Act on behalf of the tenant for life; besides, the notice would be a mere form; see <i>Re Countess of Dudley's Contract</i> , 35 Ch. D. 338, 342. But the committee of the estate of a lunatic selling under s. 62 appears to be in a different position; he actually stands in place, and would convey in the name, of the lunatic. He must therefore previously have obtained authority from the Court of Lunacy to give notice: <i>Re Ray</i> , 25 Ch. D. 464.
Notice by trustees.	
By lunatic's committee.	
Where trustees bound to take proceedings.	The trustees to whom notice is given are not bound to take proceedings, whatever their opinion may be, as to the proposed dealing. In <i>Wheelwright v. Walker</i> , 23 Ch. D. 762, Pearson, J., seemed to think that if a tenant for life were attempting to commit a fraud, as by selling for a very low price, it would be the duty of the trustees to interfere, but s. 42 expressly exempts them from liability for not taking any proceeding which it is competent for them to take: and see as to the duty of trustees, <i>Hatten v. Russell</i> , 38 Ch. D. 334. In the case of a fraudulent sale or other disposition, the purchaser must almost necessarily be a party to the fraud, and the transaction could be set aside. It is conceived that any proceeding must be at the risk of the trustees: but see <i>Hatten v. Russell</i> , <i>ubi sup.</i> , p. 344.
Time of notice.	
Time of notice.	It is sufficient for the purchaser if at the time of completion of the contract there are trustees, and notice has been given: <i>Hatten v. Russell</i> , 38 Ch. D. 334. The notice is a matter with which the purchaser acting in good faith is not concerned: <i>Duke of Marlborough v. Sartoris</i> , 32 Ch. D. 623. Obviously the purchaser could not tell whether the tenant for life knows the trustees' solicitor. The private solicitor of a trustee is not necessarily his agent for accepting notices relating to the trust: <i>Saffron Walden Building Society v. Rayner</i> , 14 Ch. D. 406.
	It is best, however, for the vendor, unless notice has expired or been waived, to provide that the contract is not to become binding until the notice has expired or been waived, without any proceedings being taken whereby the sale is prevented. The Court would, it seems, restrain the granting of a lease until trustees are appointed, or the necessary notice given: <i>Mogridge v. Clapp</i> , 1892, 3 Ch. 382, 400; <i>Wheelwright v. Walker</i> , 23 Ch. D. 752.
Protection of purchaser.	The purchaser, though expressly protected by subs. 3 from seeing that notice is given, had better see that there are or have been in existence at least two trustees, or one trustee in cases where the settlement provides that one trustee may act alone: see <i>Hughes v. Fanagan</i> , 30 L. R. Ir. 111. Under the S. L. A., 1884, notice may be waived by the trustees, and they may accept less than the month's notice, therefore the purchaser need not see that the two trustees or the one trustee, as the case may be, have been appointed at least a month
Waiver of notice.	

previous to completion. Where the transaction is a sale the concurrence of the trustees in the conveyance to acknowledge receipt of the purchase-money would in itself be a waiver of notice. If the purchase-money is to be paid to the trustees the purchaser must see to the due appointment of those trustees, otherwise he does not obtain a valid receipt, unless the sale is made by the order of the Court: see C. A., s. 70.

Actual knowledge that no proper notice has been given—*e.g.* from the knowledge that there were no trustees—or that there was no waiver, would invalidate his title: *Hatten v. Russell*, 38 Ch. D. 334; *Hughes v. Fanagan*, 30 L. R., Ir. 111, on appeal. In such cases not even the legal estate would pass to the purchaser, and an agreement would be unenforceable. An omission to give the necessary notice would be a breach of trust (s. 53, *infra*, and note thereto), a tenant for life would therefore be unable to enforce specific performance, *Thompson v. Blackstone*, 6. Beav. 470. The doctrine of constructive notice, however (C. A., 1882, s. 3, *supra*), is not to be applied to invalidate titles of persons dealing in good faith with a tenant for life: *Mogridge v. Clapp*, *ubi sup.*

And, on the question, generally, of notice to trustees, see that case, and *Hughes v. Fanagan*, *ubi sup.*

All settlements should expressly dispense with notice, at least as to leases, where S. L. A., 1890, s. 7, does not already do so.

An order has been made by the Court dispensing with notice under this s., but it seems very doubtful whether any such order can properly be made: *Honywood v. Honywood*, 1862, H. No. 121, 25th July, 1883.

An enfranchisement is a sale within this s.: see note to s. 3 (ii.).

The case of a surrender, pure and simple, is omitted.

SS. 45, 46.

TRUSTEES.

Notice in case of leases.

Order dispensing with notice.

Enfranchisement.

Surrender.

XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

Applications are directed to be by summons in Chambers: see Rule 2, Chap. VIII, *infra*.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

COURT; LAND COMMISSIONERS; PROCEDURE.

Regulations respecting payments into Court, applications, &c.

S. 46.
 COURT; LAND
 COMMISSIONERS;
 PROCEDURE.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

See *Re Marquis of Ailesbury's S.E.*, 42 W. R. 45, and r. 6, Ch. VIII., *infra*.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

It would seem that in the ordinary course costs will be given as between solicitor and client: see Form III., Ch. VIII., *infra*.

Costs have been given where the application was unsuccessful: *Re Horne*, 39 Ch. D. 84, 90. And not only the costs of the application, but other costs of and incidental to the exercise of the powers of the Act (e.g. of an abortive sale), can be made a charge on settled land under this subs. and s. 47: *Re Smith's S. E.*, 1891, 3 Ch. 65; and see *Re Llewellyn*, 37 Ch. D. 317, 326. Trustees taking different sides were allowed separate costs in *Re Marquis of Ailesbury's S.E.*, 1892, 1 Ch. 506. As to the difference between costs and charges or expenses, see *Re Beddoe*, 1893, 1 Ch. 547, 554. Costs of successful applications were in *Re Bagot's S. E.*, 1894, 1 Ch. 177, directed to be paid by the tenant for life, and in *Williams v. Jenkins*, W. N., 1894, 176, charged on the settled land subject to existing mortgages.

See also note on S. 21 (x.) *supra*. For form of order, see Seton, 5th ed., 1521.

39 & 40 Vict.
 c. 59.
 44 & 45 Vict.
 c. 68.

(7.) General Rules for purposes of this Act shall be deemed Rules of Court within s. 17 of the Appellate Jurisdiction Act, 1876, as altered by s. 19 of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

See S. L. A. Rules, Chap. VIII., *infra*.

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

The power of the Court may also, as regards land in the County Palatine of Durham, be exercised by the Court of Chancery of that County: see Palatine Court of Durham Act, 1889, s. 10.

And as to the present authority to make rules for the Lancaster Court, see Chancery of Lancaster Act, 1890, s. 6.

SS. 46, 47.

COURT; LAND
COMMISSIONERS;
PROCEDURE.

(9.) General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Durham
Palatine Court.
Lancaster
Court Rules.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

As to proceedings in the County Court under this Act, see County Court Rules, 1889, Or. xxxviii.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or

Payment of
costs out of
settled
property.

SS. 47, 48.
 —
 COURT; LAND
 COMMISSIONERS;
 PROCEDURE.
 —

any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

Costs.

As to payment of the tenant for life's costs of a sale including those of his own incumbrancers, see *Re Beck*, 24 Ch. D. 608. But this case was not followed as to the costs of the tenant for life's incumbrancers, which were disallowed in *Cardigan v. Curzon Howe*, 40 Ch. D. 339: see S. C. on Appeal, 41 Ch. D. 375. As to costs incidental to the exercise of the powers of this Act, see s. 21 (x.), and note; also s. 46 (6).

For form of Order, see Seton (5th ed.), 1521.

Constitution of
 Land Commis-
 sioners; their
 powers, &c.

48.—(1.) *The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.*

52 & 53 Vict.
 c. 30.

The Land Commissioners are now the Board of Agriculture: see the Board of Agriculture Act, 1889, s. 2 (1) (b.), and s. 13, which repeals this s. down to the end of subs. (5).

Subss. 2-5 relate solely to the powers and duties of the Land Commissioners generally, and are accordingly omitted here.

27 & 28 Vict.
 c. 114.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land

Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

SS. 48, 49, 50.

COURT; LAND
COMMISSIONERS;
PROCEDURE.

It is conceived that the expression "Act passed" only speaks and has effect after the Act in which it is contained has passed and includes that Act.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

Filing of
certificates,
&c., of Com-
missioners.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

RESTRICTIONS,
SAVINGS,
AND GENERAL
PROVISIONS.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

Powers not
assignable;
contract not
to exercise
powers void.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually

S. 50.
 RESTRICTIONS,
 SAVINGS,
 AND GENERAL
 PROVISIONS.

in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

See on this s., S. L. A., 1890, s. 4, which declares an instrument affecting the interest of the tenant for life by way of marriage settlement or family arrangement to be, not an assignment within this s., but part of "the settlement."

Disclaimer.

This s. does not expressly provide against disclaimer of a power, but a tenant for life could not disclaim the power and accept the estate; the disclaimer to be effectual must be complete, more especially as he is a trustee of the power, s. 53; see *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 540; and compare the principle followed in *Slaney v. Watney*, L. R. 2 Eq. 418.

Effect of s.

The effect of this s. is that the person defined in the Act as tenant for life entitled to exercise the powers conferred by the Act, always remains so entitled. He cannot divest himself of those powers, nor contract absolutely not to exercise them, but he may by assignment for value prevent himself from exercising the powers as against the assignee (see the effect of this s. taken with s. 20 (2) (ii.), discussed in *Re Sebright's S. E.*, 33 Ch. D. 429; *Cardigan v. Curzon-Howe*, 40 Ch. D. 338, 41 *ib.* 375); compare *Hardaker v. Moorhouse*, 26 Ch. D. 417. It would seem that although a tenant for life may have actually conveyed the estate, for his life interest therein, yet no release or reconveyance by his assignees is necessary. Their mere consent to the exercise of the power restores its full operation under s. 20, and it overrides all the limitations of the settlement. Thus the execution of powers under the Act is governed by the same principle as the execution of powers conferred by a settlement (as to which, see *Re Cooper*, 27 Ch. D. 565; *Noel v. Lord Henley*, M'Cl. & Y. 302; *Re Bedingfield & Herring's Contract*, 1893, 2 Ch. 332); except that the latter are capable of being released and extinguished, and are bound by a contract not to exercise them; there is this further exception, namely, that a lease under the Act without fine made by the tenant for life while he remains in possession will bind all his assignees.

The same principle applies to assignments made before as well as to those made after the commencement of the Act, and to assignments made by the tenant for life of his estate before it falls into possession.

Subs. 4, so far as regards leases, is stronger as against a mortgagee under a mortgage of a life estate than the power of leasing in s. 18 of the C. A., 1881, as against a mortgagee of the fee simple. The latter power does not affect a mortgagee prior to the Act or a mortgagee who contracts himself out of the Act. Under subs. 3 and 4 of this s. any lease at the best rent and without fine made in conformity with this Act by a tenant for life while in possession binds his mortgagee, whether the mortgage be made before or after this Act and notwithstanding any agreement to the contrary. This seems unobjectionable, as the mortgagee of a tenant for life has no permanent interest in the land, and the exercise of the power must generally be for his benefit by producing income; see *Re Mansel's S. E.*, W. N., 1884, 209.

Notwithstanding this s. the tenant for life will cease to have the powers conferred by the Act when there is a complete disentail operating as a complete disposition of the fee simple by tenant for life and remainderman. The land, then, no longer "stands for the time being limited to or in trust for any persons by way of succession" within s. 2 (1), and is no longer settled land within s. 2 (3), and the Act ceases to apply to it. If there be a re-settlement, that of course brings the Act again into operation. It will still be necessary, as at present, to preserve the life estate under the prior settlement in cases where it is desired to sell free from the charges of jointure and portions under that settlement; otherwise they, being "charges having priority to" the re-settlement, could not be overreached by the statutory power attached to the new life estate (s. 20 (2) (i.)): see, however, *Re Marquis of Ailesbury and Lord Iveagh*, 1893, 2 Ch. 345; but it is conceived that, as in the case of ordinary settlement powers, so in the case of the statutory powers, the customary relimitation to the first tenant for life of his old life estate with all powers annexed thereto would put him back in the same position as before the disentail and re-settlement, he being in of his old estate: Sug. Powers, 71, 8th ed.; *Re Wright's Trustees and Marshall*, 28 Ch. D. 93, and note to s. 20.

The powers of the Act are given to a tenant in tail in possession (s. 58), but the Act ceases to be applicable when he bars the entail.

Also, on a release by the tenant for life to the immediate remainderman in fee the Act ceases to be applicable, even where a jointure or portions are still payable. They form merely a charge, the estate for life is extinguished, and there ceases to be any estate in the land which stands limited by way of succession within s. 2 (1).

As to how long the powers of a tenant for life continue, see also note to s. 2 (2) and (4).

51.—(1.) If in a settlement, will, assurance, or other instrument, executed or made before or after, or partly before and partly after, the commencement of this Act a

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RESTRICTIONS,
SAVINGS,
AND GENERAL
PROVISIONS.

Ceasing of
powers of
tenant for life.

Effect of re-
settlement.

Release by
tenant for life
to remainder-
man in fee.

Prohibition
or limitation
against
exercise of
powers, void.

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 —
 RESTRICTIONS,
 SAVINGS,
 AND GENERAL
 PROVISIONS.
 —

provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

The previous s. precludes the tenant for life from divesting himself of the powers conferred by the Act. This s. precludes the settlor from taking away or cutting down those powers, and from giving them to trustees instead of to the tenant for life: *Re Clitheroe Estate*, 31 Ch. D. 138; and overrides a private Act: *Re Chaytor's S. E. Act*, 25 Ch. D. 651; but there must be, to begin with, a limitation which, but for the attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act: see *Re Atkinson*, 31 Ch. D. 577, 581; *Re Hazle's S. E.*, 29 Ch. D. 78, 84. Subs. 1 makes any clause of forfeiture void, and by subs. 2 an estate originally limited so as to cease when the tenant for life attempts to make use of the powers of the Act, is enlarged into the estate which would have existed irrespective of the clause of cesser, and see *Re Hale and Clark*, 34 W. R. 624; W. N., 1886, 65, for a case where a restriction imposed by a settlement was held ineffectual.

The restraint on anticipation by a married woman is removed (s. 61 (6)) so as to enable the powers of the Act to be exercised by her notwithstanding that restraint.

The provisions made void by this s. are only provisions which prevent or tend to prevent the exercise of the powers of the Act.

Consequently a limitation over on bankruptcy of a tenant for life or on alienation of his life estate is not affected: *Re Levy's Trusts*, 30 Ch. D. 119. After a sale of the fee simple under the Act he would still be entitled to the income of the proceeds of sale until bankruptcy or alienation. There is, therefore, in such a case no provision tending to prevent the exercise of the statutory powers. Also an obligation to create a sinking fund, to pay off moneys raised for improvements under the settlement, is valid, since it does not interfere with the powers conferred by the Act: *Re Sudbury and Poynton Estates*, 1893, 3 Ch. 74. On the other hand, a limitation over in case of non-residence seems to be rendered void, as a sale under the statutory power would prevent residence: *Re Paget*, 30 Ch. D. 161. In that case it was only decided that the forfeiture for non-residence would not apply to the income of the proceeds of sale. In the case of *Re Haynes, Kemp v. Haynes*, 37 Ch. D. 306, North, J., held that ceasing to reside before sale caused a forfeiture. It is difficult to see how this decision can be reconciled with subs. 1, which makes the condition void in all cases without exception, or with subs. 2, which is not confined to the income of the proceeds of sale, but enlarges the estate of the tenant for life in the settled land itself, and makes that estate continue for its whole possible existence irrespective of the condition as to residence. To hold that a forfeiture clause is effective notwithstanding this s. works against the settlor's intention. The tenant for life must sell in order to avoid residence. Also, under s. 24 (2) it would seem that a condition compelling residence, if effective, must apply to any other estate purchased with the proceeds of sale, and compel the tenant for life to reside where the testator never intended him to reside. The words "as near thereto as circumstances permit" seem clearly to shew that the condition as to residence, if not made void, must, like any other condition (for instance, a condition binding the tenant for life to insure or do repairs), be imported into the settlement of any estate purchased, and be applicable thereto as it was to the estate sold. The condition of residence as applied to a particular estate is practically useless where the tenant for life has a power of sale: see also, *Re Thompson*, 21 L. R. Ir. 109.

The prohibition in this s. applies not only to a provision in the settlement itself, but also to a provision in any other instrument. Thus a bequest of income, for keeping up a settled estate, and of the balance to the tenant for life, with a provision, that if he should cease to be entitled to the rents and profits, the income bearing fund should fall into residue, takes effect under subs. 2 as a bequest of income for life, and does not cease on sale of the estate: *Re Ames*, 1893, 2 Ch. 479.

It is conceived that a limitation by way of trust or otherwise to A. for his life of an annuity payable out of rents and profits, greater in amount than the income of the property, and, subject thereto, a limitation of the property during A.'s life to the use of or in trust for B., would not prevent A. or B. being in effect tenant for life within the Act. One or other would be entitled to the income within s. 58 (1)

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RESTRICTIONS,
SAVINGS,
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PROVISIONS.

Attempts to
evade the Act.

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PROVISIONS.

(ix.): and see, *Re Marquis of Ailesbury & Lord Iveagh*, 1893, 2 Ch. 345, 357. Independently of the Act the Court would treat A. as actual tenant for life and let him into possession or receipt of the rents, giving liberty to B., if at any time he thought the income exceeded the annuity, to apply to be let into possession or receipt. On any such application it is conceived that B. would be required when let into possession to undertake to keep down the annuity, and if so A. might be held to be tenant for life (but see *Re Bective Estates*, 27 L. R. Ir., 364) determinable on the event of the rents and profits exceeding the annuity, and thus a tenant for life within s. 58 (1) (vi.). Or B. would be so held under s. 58 (1) (ix.), or s. 2 (5) (7): see *Re Jones*, 26 Ch. D. 736: *Re Clitheroe*, 28 ib. 378; 31 ib. 135. It would also be open to A. to bring an action to have it declared that the limitation is an attempt to evade the Act within the meaning of s. 51 as a provision "tending or intended . . . to prohibit or prevent him from exercising" the powers of the Act, and therefore void.

Provision
against for-
feiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

See *Re Haynes, Kemp v. Haynes*, note to last s.

Tenant for
life trustee
for all parties
interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

See also S. L. A., 1890, s. 12.

As a general rule the tenant for life is entitled to make the full profit out of all the legal incidents of his life estate. He may, when not impeachable for waste, cut all the profitable timber, though equity will restrain him from cutting where it is without adequate advantage and, apparently, simply malicious. On the same principle, before the Act 8 & 9 Vict. c. 106, s. 8, a tenant for life, with remainder to issue unborn, with remainder to himself in fee, could by simple conveyance destroy the contingent remainder, and no relief could be obtained in equity. But by this s. he is made a trustee as to all powers conferred on him by the Act, and is accountable as such. Thus the tenant for life may make an improper or improvident sale or lease, good in favour of the purchaser or lessee under the next s. 54, but under this s. he will be answerable to the same extent as a trustee making the same sale or lease; this s. does not impose a condition affecting title: *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 536, 545. The general effect of this s. is to make the tenant for life answerable for an improvident or improper exercise of the powers conferred on him by the

Act in the same manner as if he were an actual trustee; but he may override the sentimental objections of remaindermen, and the Court will consider the interests of the people upon his estate, see *Cardigan v. Curzon-Howe*, 30 Ch. D. 531, 539; *Re Duke of Marlborough*, *ib.* 127, 134; 32 *ib.* 8, 11; *Re Lord Stamford's S. E.*, 43 *ib.* 84, 95; *Re Earl of Radnor's Will Trusts*, 45 *ib.* 402, 416, 423; *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 540; *ib.* A. C. 356; *Sutherland v. Sutherland*, 1893, 3 Ch. 169. And the fact that he will derive a benefit is not in itself sufficient to prevent him from exercising his discretion: *Re Lord Stamford*, 56 L. T. 484; or altering the devolution of the property: *Re Duke of Marlborough*, 32 Ch. D. 1, 11. Nor will he be restrained from selling merely on speculative evidence adduced by the remainderman of the prospective value of the estate: *Thomas v. Williams*, 24 Ch. D. 558. *Secus*, if he attempts to sell the property infinitely below its value: *Wheelwright v. Walker*, 23 *ib.* 752, 762, *per* Pearson, J. See also note to s. 3 (i.). And the Court will restrain a tenant for life from mortgaging, when the mortgage would unjustly prejudice the interests of other persons claiming under the settlement: *Hampden v. Earl of Buckinghamshire*, 1893, 2 Ch. 531. For a case in which a lease was held invalid under this s., see *Sutherland v. Sutherland*, *ubi sup.*

SS. 53, 54, 55.

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SAVINGS,
AND GENERAL
PROVISIONS.

When sale not
restrained.

A person claiming under the tenant for life cannot complain of a breach of trust committed by him: *Re Freme*, 1894, 1 Ch. 1, 10.

The tenant for life is not entitled to trustees' costs: but see *Re Llewellyn*, 37 Ch. D. 317, 325—8; *Re Smith's S. E.*, 1891, 3 Ch. 65. Only one set of costs was allowed to him and his mortgagees in *Sebright v. Thornton*, W. N., 1885, 176: and see *Cardigan v. Curzon-Howe*, 40 Ch. D. 339; 41 *ib.* 375.

Costs.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

General protection of
purchasers, &c.

This s. makes good the title of all persons claiming under an exercise by the tenant for life of the powers of the Act, provided they are not parties to and have no notice of any improper dealing. In regard to notice the C. A., 1882, s. 3, aids the purchaser's title.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

Exercise of
powers;
limitation of
provisions, &c.

SS. 55, 56.

RESTRICTIONS,
SAVINGS,
AND GENERAL
PROVISIONS.

See n. to s. 48, (1.) *suprà*, as to the substitution of the Board of Agriculture for the Land Commissioners.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

See the special powers for completion of sales, &c., conferred by s. 20, and S. L. A., 1890, s. 6.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

See *Re Llewellyn*, 37 Ch. D. 317, 326-8; *Re Smith's S. E.*, 1891, 3 Ch. 65.

Saving for
other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

Under the S. L. A., 1884, s. 6 (2), the consent of any one of two or more persons constituting the tenant for life is sufficient.

By this s. all the powers of the settlement are preserved, but it would be very inconvenient where trustees have powers for sale or for other purposes at their discretion, that there should be also concurrent powers vested in the tenant for life under the Act. It is therefore provided that in all cases powers in trustees similar to those conferred by the Act are to be exercised only with the consent of the tenant for life: see *Re Clitheroe*, 28 Ch. D. 378; 31 *ib.* 135; *Re Atherton*, W. N., 1891, 85. A person dealing with the tenant for life thus knows that no other antagonistic dealing can take place. The effect of this and the next s. is, that the settlor may enlarge but cannot restrict the powers of a tenant for life under the Act.

In *Re Duke of Newcastle*, 24 Ch. D. 138, Pearson, J., considered that the first part of subs. 2, "But, in case of conflict, &c." merely meant that if there were a power in the settlement for the same purpose but not so large as a power in the Act, the tenant for life might exercise the power in the Act. But this is a case of cumulation, not of conflict, and is provided for by subs. 1. Two powers in one person cannot create any conflict; the one first exercised prevails. But a power under the settlement to trustees and a power for the same purpose under the Act to a tenant for life might create conflicting interests. Therefore subs. 2 provides that an exercise by the tenant for life of the powers of the Act is to prevail, and that the trustees are not to exercise their powers under the settlement without his consent. In this view the latter part of subs. 2 does not seem, as the learned judge thought, to go away altogether from the case in the first part of the subs.

It is conceived, however, that to the exercise of a power given to trustees for raising charges by mortgage or sale, the consent of the tenant for life would not be necessary. The trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges. Therefore a contract by the trustees to sell in such a case would prevail over a similar contract by the tenant for life, and no difficulty would arise. The case would be similar to that of contracts by two successive mortgagees, each with a power of sale. This construction is supported by the words "power exercisable for any purpose provided for in this Act," which must mean purposes connected with the settled land and the settlement, not purposes paramount to the rights of the persons claiming under the limitations of the settlement.

When the tenant for life contracts to sell it is clear that he can give a title to a purchaser free from charges created by the settlement under which no money has been raised, s. 20 (2) (ii.), and they would be transferred to the proceeds of sale. In such case there would be no conflict between the provisions of the settlement and the provisions of this Act, and the trustees would not be necessary parties to the conveyance except for the other purposes of the Act.

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RESTRICTIONS,
SAVINGS,
AND GENERAL
PROVISIONS.

Amended by
S. L. A., 1884.

Mode of
exercise of
settlement
powers.

Conflict and
cumulation.

When trustees
can mortgage
or sell.

When tenant
for life can sell
alone.

Conflicting
powers.

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RESTRICTIONS,
SAVINGS,
AND GENERAL
PROVISIONS.

Rents during
minority.
Settlement
powers how
exercisable.

Mining rents.

Power under
Act cumula-
tive.

Stay of pro-
ceedings under
Settled Estates
Act.

Private Act
overreached by
this Act.

Additional or
larger
powers by
settlement.

Trustees contracting to sell, without any power to do so, cannot compel the purchaser to take a fresh contract from the tenant for life, as vendor under this Act: *Re Bryant and Barningham*, 44 Ch. D. 218.

In the case of *Re Duke of Newcastle*, 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779, it was held,

(1.) That rents received by the trustees during minority were to be dealt with as directed by the settlement without regard to the Act.

(2.) That a power to trustees by the direction of the tenant for life or in tail in possession, if of age, and, if not, of his guardians, to sell or exchange was exercisable by the trustees during minority of the infant tenant in tail by the direction of the guardians.

(3.) That a power to the guardians during minority to grant agricultural, building, and mining leases was exercisable by them with the consent of the trustees, as taking, under s. 60, the power to consent given to the tenant for life under s. 56 (2).

(4.) That mining rents were to be applied as directed by the settlement, there being a "contrary intention" expressed within the meaning of s. 11;

And (5.) That though there was no power for the purpose in the settlement, the trustees could, under s. 60, sell surface apart from minerals under s. 17, and the consent of the guardians would not be necessary.

Proceedings under an order for sale made under the S. E. A., may be stayed so as to enable a sale under this Act (*Re Barrs-Haden*, 32 W. R. 194; W. N., 1883, 188); or a lease: *Re Poole*, 32 W. R. 956. And the powers under this Act overreach the provisions of a private estate Act passed previously to the commencement of this Act (*Re Chaytor*, 25 Ch. D. 651), but not an actual order, by the Court, for sale: *Taylor v. Poncia*, *ib.* 646; and note to s. 3 (i.), *suprà*.

As to conferring powers under the S. E. A., when powers under this Act can be exercised, see *Re Mansel's S. E.*, W. N., 1884, 209; *Re Houghton's S. E.*, W. N. 1894, 20.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

For form of summons for opinion, advice, and direction under this subs. see Form XXI., Chap. VIII., *infra*.

In a petition under s. 56, Bacon, V.-C., required an allegation of the "statutory conflict": *Re Clitheroe Estate*, 28 Ch. D. 388.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

SS. 57, 58.

RESTRICTIONS,
SAVINGS,
AND GENERAL
PROVISIONS.

This subs. prevents any question as to how the combined powers of the settlement and the Act operate. An additional power to sell or lease could, under the settlement taken alone, only operate by revocation and appointment of uses. Under this subs. the additional powers will be common law powers taking effect in the same manner as the powers of the Act: see note to s. 20.

XIII.—LIMITED OWNERS GENERALLY.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

LIMITED
OWNERS
GENERALLY.

Enumeration
of other limited
owners, to have
powers of
tenant for life.

“Possession” in this s. means possession properly so called as distinguished from remainder or reversion, and there is no distinction as regards a person in possession personally or by his guardian if an infant: *Re Morgan*, 24 Ch. D. 114, 116; *Re Jones*, 26 *ib.* 736, 744; *Re Strangways*, *Hickley v. Strangways*, 34 *ib.* 423, and see s. 2 (5).

“Possession.”

“Possession” includes receipt of rents and profits (s. 2 (10) (i.)), so that a lease does not prevent the estate or interest being in possession.

- (i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

This subs. extends the benefits of the Act to tenants in tail under Acts of Parliament (“settlement” includes “Act of Parliament,” s. 2 (1)), which restrain a bar of the entail. It also enables a sale

As to certain
unbarrable
entails.

S. 58.
 —
 LIMITED
 OWNERS
 GENERALLY.
 —

where a bar of the estate tail is prevented by the Act 34 & 35 Hen. 8, c. 20 (as to which see Fines and Recoveries Act, 1833, s. 18). It also, in connection with subs. (iii.), enables the Crown reversion in Ireland under a grant from the Crown to be bound, though the tenant in tail cannot bar it by enrolled deed—see Fines and Recoveries (Ireland) Act, 1834—as he can in England under the English Act (s. 15) where the case is not within the Act of Hen. 8. But then, under s. 22 (5) of this Act, the money (subject to any application under s. 21), or the investments representing it, and, under s. 24, the land acquired with it, will become inalienable, or subject to a reversion in the Crown, as the case may be (see note to subs. iii.). The Act does not apply to lands purchased with money provided by Parliament for public services. Thus the estates settled on the Dukedom of Wellington and the Earldom of Nelson cannot be sold under this Act. But the lands settled on the Earldoms of Shrewsbury and Abergavenny, and all lands which have hitherto become inalienably entailed under the Act 34 & 35 Hen. 8, c. 20, can now be sold; also the lands and mansion settled on the Dukedom of Marlborough, inalienably entailed under 5 Anne, c. 3, being respectively lands provided by the Crown with the sanction of Parliament, and a mansion, principally built at the expense of the Crown out of moneys granted by Parliament: *Re Duke of Marlborough's Parliamentary Estates*, 8 T. L. R. 179; *Re Duke of Marlborough's Blenheim Estates*, *ib.* 582; see also, S. L. A., 1890, s. 10, *infra*.

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

This subs. must be read with C. A., 1882, s. 10, *suprà*; and see u. to s. 2 (1), *suprà*.

Instances of
 executory
 devise.

Where there was a devise upon trust to pay the rents to the testator's wife for the maintenance of his son until twenty-one, and then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon trust for the wife for life, and after her death upon other trusts, it was held that under this subs. the infant son was in the position of a tenant for life, being tenant in fee simple with an executory limitation over, and the trustees of the will were appointed trustees for the purposes of the Act: *Re Morgan*, 24 Ch. D. 114; and where the fee, legal or equitable, is devised to such children of A. as attain twenty-one, the first child or the several children attaining that age (in whom the fee vests, subject, if and when others attain twenty-one, to be divested as regards the shares of the others: see Fearn, Contingent Remainders, 313–15), and in the mean time the heir-at-law, to whom the fee descends until the contingency happens, are under this subs. tenants for life within the meaning of the Act of the shares which have not vested indefeasibly: *Re James*, W. N., 1884, 172; 32 W. R. 898; *Egerton v. Massey*, 3 Com. B., N. S.,

338; *Wade-Gery v. Handley*, 1 Ch. D. 653; 3 *ib.* 374; see also, *Pells v. Brown*, Cro. Jac. 590.

S. 58.

LIMITED
OWNERS
GENERALLY.

- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

A tenant for life of a base fee can convey the fee simple: *Re Morshead's S.E.*, W. N., 1893, 180.

This subs. requires to be considered under two aspects. First, there may be a person entitled to the whole base fee. Then the deed under which he acquired that fee and the original grant from the Crown together form the settlement, and trustees for the purposes of this settlement must be appointed. Then the fee simple can be sold free from the reversion in the Crown, but, subject to investment or application under s. 21, and except for re-investment in the purchase of land, the trustees cannot properly part with the money without the concurrence of the Crown, and on re-investment the trustees should see that the reversion is limited to the Crown. Secondly, the base fee may be itself settled. Then trustees may be appointed either (1) of the settlement of the base fee only, in which case on a sale by the tenant for life the base fee only is sold and the Crown's reversion is untouched, or (2) trustees may be appointed of the whole settlement of the fee simple including the settlement of the base fee and grant from the Crown, in which case a sale bars the Crown's reversion, and then also, subject and except as above mentioned, the trustees cannot properly part with the money without the concurrence of the Crown.

This subs. will have an important effect in Ireland, where there are large tracts in which the Crown has a reversion on a base fee. The tenant for life will now be able to sell free from this reversion, provided trustees are appointed of the whole settlement, including the grant from the Crown, in which case however the trustees may feel difficulty in parting with the purchase-money without consent of the Crown except for re-investment in land. The only mode of barring the Crown's reversion is by a sale through the Landed Estates Court (12 & 13 Vict. c. 77, s. 27). It is conceived that there are many cases in England where the fact that a perpetual entail exists under the Act 34 & 35 Hen. 8, c. 20, has been altogether lost sight of. If the Crown grant be before that Act, a recovery before the Act barred the issue but not the Crown's reversion (*Neal v. Wilding*, 1 Wilson, 275), and after the Fines and Recoveries Act the reversion also could be barred, and thus a complete title obtained. In many cases it may be difficult to ascertain whether the entail is subsisting or not.

Crown reversion in Ireland.

- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

S. 58.
 —
 LIMITED
 OWNERS
 GENERALLY.
 —

A person entitled to receive rent of freehold land during the subsistence of a lease for years thereof, if he should so long live, and also to receive an annuity for life, equal to the rent, after the determination of the lease, is not tenant for life within the meaning of this subs. (*Re Hazle*, 26 Ch. D. 428, affirmed 29 *ib.* 78); see also, subs. (vi.).

A tenancy for ninety-nine years, if the tenant should so long live, was often limited, in old settlements, instead of a tenancy for life, with the view of making the suffering of a recovery more difficult: see *Martin's Conveyancing*, Vol. I., p. 428; *Peachey on Settlements*, p. 13, note (g); *Burton's Compendium*, pl. 1449; *Bell v. Holtby*, 15 Eq. 189; and compare *Woolmore v. Burrows*, 1 Sim. 512, 527.

(v.) A tenant for the life of another not holding merely under a lease at a rent:

See *Re Atherton*, W. N., 1891, 85, cited on s. 2 (5), *suprà*.

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

A limitation to a widow during widowhood, or to one so long as he resides, gives, in law, an estate for life determinable, see Co. Lit. 42a.; *Burt. Comp.* pl. 725; *Williams Real Property*, 12th ed., p. 22.

Limitation
 over on non-
 residence.

A devise to A. so long as he resides a specified time and then over, makes him tenant for life within this subs.: *Re Paget*, 30 Ch. D. 161. A tenant for life subject to a term is within this subs., although during the subsistence of the term he could not take possession: *Re Clitheroe*, 28 Ch. D. 378; 31 *ib.* 135; see also cases cited under subs. (ix.), *infra*. Also a tenant for life, whose estate is suspended during an implied trust for accumulation, *Williams v. Jenkins*, 1893, 1 Ch. 700. A discretionary trust in trustees during the life of A. to pay the rents for the benefit of A. and his wife and children (there being no children in existence), does not make A. and his wife a tenant for life under this subs.: *Re Atkinson*, 30 Ch. D. 605, affirmed 31 *ib.* 577; and see *Re Horne*, 39 *ib.* 84; and a trust to accumulate for twenty years and then to convey to uses under which an existing person, if then living, would be tenant for life does not make him a present tenant for life within the Act: *Re Strangways*, 34 Ch. D. 423, and see *Re Horne*, *ubi sup.*; *Re Hazle*, cited on subs. (iv.).

Trust to
 accumulate.
 Discretionary
 Trust.

(vii.) A tenant in tail after possibility of issue extinct:

(viii.) A tenant by the curtesy:

Where the wife takes the fee under a conveyance or will, that would be a settlement within the definition of settlement, s. 2 (1): and under S. L. A., 1884, s. 8, an estate by the curtesy in cases of descent as well as conveyance is to be considered as arising under a settlement made by the wife.

And see *Mogridge v. Clapp*, 1892, 3 Ch. 382.

S. 58.
—
LIMITED
OWNERS
GENERALLY.

—
Tenant by
the curtesy.

- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

Subject to a term for raising money there was a devise to the use of trustees during the life of A. upon trust to enter into possession, and manage and pay expenses and outgoings and an annuity, and pay the balance of the rents to A. during his life. There was no balance. It was held that A. had under this subs. the powers of a tenant for life: *Re Jones*, 24 Ch. D. 583, affirmed 26 *ib.* 736; see also *Re Clitheroe*, 28 *ib.* 378, affirmed 31 *ib.* 135; *Re Cookes*, W. N., 1885, 177.

"Entitled to the income of land" means entitled under the limitations of the settlement without regard to incumbrances: *per* Cotton, L.J., *Re Jones*, 26 Ch. D. 738; and does not mean entitled under a discretionary power: *Re Atkinson*, 31 Ch. D. 577; *Re Horne*, 39 *ib.* 84, 89. A trust to repair does not prevent the equitable tenant for life from being let into possession upon an undertaking to repair: *Re Bentley*, 54 L. J. Ch. 782; 33 W. R. 610; and see *Taylor v. Taylor*, 20 Eq. 297; *Re Wythes*, 1893, 2 Ch. 369; *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297. As to "expenses of management," see *Clark v. Thornton*, 35 Ch. D. 311.

Effect of trust
for repairs

It is conceived that where there is a trust for sale, the person entitled to the income of the land until sale, has not, under this subs., the powers of a tenant for life; but can get those powers only under s. 63, taken with S. L. A., 1884, s. 7, and subject to an immediate trust for sale is not—except under those ss.—"settled land" for purposes of the S. L. A.'s, though for those of the S. E. A. it would be: see *Re Laing's Trusts*, 1 Eq. 416; *Collett v. Collett*, 2 Eq. 203.

"Until sale of
the land."

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to

SS. 58, 59, 60. death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

LIMITED
OWNERS
GENERALLY.

The general effect of this s. is, that in all the preceding provisions of the Act each limited owner here mentioned is to be considered as also inserted wherever tenant for life is mentioned, and all consequential provisions as to trustees, the Court, and other matters apply to the case of each such limited owner "as if each of them were a tenant for life" (subs. 1), as well as to the case of a tenant for life.

See also the Glebe Lands Act, 1888, s. 8 (4).

INFANTS;
MARRIED
WOMEN;
LUNATICS.

XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Infant
absolutely
entitled to be
tenant for life.

"Land" means land of any tenure (see n. to s. 2 (3)), so that this s. includes copyholds and leaseholds as well as freeholds.

Infant con-
tingently
entitled.

Appointment
of person to
exercise powers
of infant.

This s. does not apply where an infant is contingently entitled: *Re Horne*, 39 Ch. D. 84; but compare *Re Sparrow's S. E.*, 1892, 1 Ch. 412, a decision on C. A. s. 41. Where an infant was entitled as heir-at-law to an undivided share, the Court appointed a person to exercise the powers of the Act on his behalf on a sale of the entirety, but refused to appoint for that purpose a co-owner: *Greenville's Estate*, 11 L. R. Ir. 138; the sale may be made out of Court: *Re Price, Leighton v. Price*, 27 Ch. D. 552.

Partnership
land.

A share to which an infant becomes entitled in possession, on an intestacy, of partnership land, is within the meaning of this s.: *Re Wells*, 31 W. R. 764; W. N., 1883, 111. It seems that "the settlement" should be described, in summonses and orders under this s., as a "settlement deemed to be existing under the S. L. A., 1882": see the order in *Re Wells*, Seton (5th ed.), 1512.

See also s. 2 (4), notes.

Tenant for
life, infant.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testa-

mentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

SS. 60, 61.

INFANTS;
MARRIED
WOMEN;
LUNATICS.

Under 49 & 50 Vict. c. 27, the mother may appoint a guardian. A widow is now always guardian of her infant children either alone or jointly with the guardians appointed by the father.

Guardian.

The effect of this s. is not to take away the powers of an infant being tenant for life, or having the powers of a tenant for life under s. 59, but to enable the appointment of persons to exercise them on his behalf. This is important in construing ss. 61, 62.

During the infancy of a person in the position of a tenant for life, any consent by him required under this Act must be given by the trustees: *Re Duke of Newcastle*, 24 Ch. D. 129.

Consent of
Infant.

A sale may be made by persons appointed under this s., though there are no trustees of the settlement within the meaning of this Act, but the purchase-money must be paid into Court: *Re Dudley*, 35 Ch. D. 338.

Sale though
no trustees.

The term, "trustees of the settlement" in this s., extends to trustees appointed by the Court under s. 38, *suprà*, S. C.

The usual practice now is to apply alternatively for the appointment of trustees, or of persons to exercise the powers of the S. L. A.'s: and the order is generally confined to authorizing their exercise in reference to some particular case. The order may direct a sale to be made out of Court: *Re Price*, 27 Ch. D. 552. For forms of orders, see Seton (5th ed.), pp. 1505-7, 1512-13, 2141.

Appointment
of trustees for
purposes of
s. 60.

An infant who takes a vested estate, liable to be divested on his death under the age of twenty-one, is within this s.: *Re James*, W. N., 1884, 172; 32 W. R. 898.

For form of summons for the appointment of persons to exercise powers on behalf of an infant see Form XXII., Chap. VIII., *infra*.

In the case of *Re Wells* (31 W. R. 764; W. N., 1883, 111), an appointment of trustees was made on the application of a next friend; and see *Greenville's Estate*, cited in note to last s.

See upon this s. *Re Powell*, cited in note to s. 63 (i.), *infra*; and *Re M'Clintock*, 27 L. R. Ir. 462.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

Married
woman,
how to be
affected.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

S. 61.

—
 INFANTS;
 MARRIED
 WOMEN;
 LUNATICS.

—
 Judicial
 separation or
 protection
 order.

A decree for judicial separation under 20 & 21 Vict. c. 85, ss. 7, 25, or a protection order under s. 21 of that Act and 21 & 22 Vict. c. 108, ss. 6, 8, or under 41 & 42 Vict. c. 19, s. 4, constitutes the married woman a *feme sole*, and she, as a tenant for life, thereby becomes entitled to sell without the concurrence of her husband. A judicial separation only makes her a *feme sole* as from the date of the decree or order (20 & 21 Vict. c. 85, s. 25), and the estate for life must have been acquired whether in possession or reversion after that date: *Waite v. Morland*, 38 Ch. D. 135. But under 21 & 22 Vict. c. 108, s. 8, a protection order makes her a *feme sole* as to an estate for life which falls into possession after the date of the order though she was previously entitled in remainder: *Re Whittingham*, 12 W. R. 775; *Re Insole*, L. R. 1 Eq. 470.

Every estate for life acquired by a married woman after 1882 is now acquired by her as a *feme sole* under the M. W. P. A.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

An order under s. 91 of the Fines and Recoveries Act affords no assistance towards dispensing with the husband's concurrence. It does not affect the husband's rights and does not enable a conveyance under a joint power: *Re Eden*, 28 L. J. (N. S.), C. P. 5.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

Infant, mar-
 ried woman.

This s. does not enable a married woman who is an infant to exercise the powers of the Act; the disability of infancy remains, notwithstanding coverture, and ss. 59 and 60 apply (*Hearle v. Greenbank*, 3 Atk. 695; Sug. Powers, 177, 8th ed.), unless the intention is clear that the power should be exercised during minority: *Re Cardross*, 7 Ch. D. 728; *Re D'Angibau*, 15 ib. 228. The effect of subs. 4 is to make all the previous ss. of the Act read as if the expression "tenant for life" had been, in the case of a married woman entitled for her

separate use, or as a *feme sole*, replaced by "married woman tenant for life," and had been in any other case replaced by "married woman tenant for life together with her husband."

Subs. 5 expressly authorizes the married woman to execute the powers of the Act by deeds and instruments which (as in the case of other powers to be exercised by deed) will not require acknowledgment: Sug. Powers, 153, 8th ed. In fact, acknowledgment is by the Fines and Recoveries Act confined to dispositions authorized by that Act, and cannot apply to any other disposition unless expressly made necessary. By the M. W. P. A., acknowledgment has ceased to be required in the case of women married after 1882, and in the case of property acquired by a married woman after 1882 without regard to the date of her marriage.

The only case in which the concurrence of the husband becomes necessary is where both the marriage and the settlement are before 1883, and the wife is not entitled for her separate use. Where she is so entitled, even though the legal estate for life be in the husband in right of the wife, still his concurrence is not necessary. He is a trustee for her. The equitable tenant for life is full tenant for life for the purposes of the Act (s. 58 (1) (ix.)), and can pass the legal estate.

As to letting a married woman, equitable tenant for life, into possession, see *Re Bagot's Settlement*, 1894, 1 Ch. 177.

62. Where a tenant for life or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

In *Re Gaitskell* (40 Ch. D. 416) the committee of a lunatic tenant in tail was authorized to take proceedings under this s. to sell his undivided shares to a co-owner of the other shares.

A lunatic not found so by inquisition cannot dispose of his fee simple land, nor does the Act enable the disposal by him of land of which he is tenant for life; he must be so found, and his committee appointed, before S. L. A. powers can be exercised on his behalf: *Re Baggs*, 1894, 2 Ch. 416; but, under ss. 116, 120, 128 of the Lunacy Act, 1890, a person can be empowered to exercise, on behalf of a person of unsound mind, not so found, powers given to the latter by a settlement: *Re X.*, *ib.* 415; so also if the lunatic be an infant ss. 59 and 60 apply,

SS. 61, 62.

—
INFANTS;
MARRIED
WOMEN;
LUNATICS.

—
Acknowledg-
ment un-
necessary.

Tenant for
life lunatic.

Person of un-
sound mind
not so found.

Lunatic infant.

SS. 62, 63.

INFANTS;
MARRIED
WOMEN;
LUNATICS.

Married
woman.

as the ordinary jurisdiction in case of infants is not ousted unless there be a commission of lunacy: *Beall v. Smith*, 9 Ch. Ap. 85, 92; *Re Edwards*, 10 Ch. D. 605. The same principle applies where a tenant in tail, who is a person having the powers of a tenant for life, s. 58 (1) (i.), is a lunatic and also an infant, and see note to s. 60. In the case of a married woman, where her husband, who has an estate in her right, and whose concurrence is necessary under s. 61 (3), is a lunatic, the powers of the Act cannot be exercised unless under a commission; but if the married woman is entitled for her separate use, or as a *feme sole*, then she alone can exercise the powers of the Act (s. 61 (2)), and in any case if she is an infant s. 59 or 60 applies.

In the case of a lunatic, as well as of any other tenant for life, notice under s. 45 must be served upon the trustees, and if necessary, trustees must be appointed for the purposes of the Act: *Re Taylor*, 31 W. R. 596; W. N., 1883, 95.

Notice under
s. 45 in case
of lunatic.

"The powers
of a tenant for
life."

An order in lunacy is necessary to enable the committee to give the notice required by s. 45: *Ray's Settled Estates*, 25 Ch. D. 464.

The powers conferred on the Court by s. 36, *suprà*, are not powers of a tenant for life for purposes of this s.; see *Re Blake*, 39 Sol. J., 330.

SETTLEMENT
BY WAY OF
TRUSTS FOR
SALE.

Provision for
case of trust
to sell and
re-invest in
land.

XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of

the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

S. 63.
 —
 SETTLEMENT
 BY WAY OF
 TRUSTS FOR
 SALE.
 —

Where a testatrix appointed real estate to trustees upon trust to sell and invest and to use so much of the annual income as should be required for the maintenance and education of her son and daughter (who were both infants) and to accumulate the remainder of the income, and when her son should attain twenty-one to pay him one moiety of the principal money and interest, and to pay to her daughter the other moiety when she should attain that age or marry; it was held that the infants were tenants for life under this s. of the Act: *Re Powell*, W. N., 1884, 67; and see *Re Horne*, 39 Ch. D. 84, where there was a discretionary trust for maintenance of children, with directions for accumulation, for the benefit of children attaining twenty-one, and so not necessarily for those children who were taking the income: and it was accordingly held in the Court of Appeal that they were not tenants for life within this s.

Infant entitled
 at twenty-one
 with trust for
 maintenance.

The trust or direction for sale under this subs. must be for immediate sale: *Re Horne*, *ubi sup.*; a devise to trustees, followed by a direction to pay debts, creates only a power to sell not a trust within this s., see, however, *Re McCurdy's S. E.*, 27 L. R. Ir. 395, where the trustees were within S. L. A., 1890, s. 16, though the fact was unnoticed.

And see *Re Hale & Clarke*, 34 W. R. 624; W. N., 1886, 65.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or

S. 63.

SETTLEMENT
BY WAY OF
TRUSTS FOR
SALE.

successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

- (ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

Capital money
under this
Act.

Where land has been bought under a power in a money settlement (e.g. a power to buy a residence, or to invest in purchase of land), and is subject to a trust for re-sale, it is conceived that capital money arising from a sale of the land under this s., and s. 7 of the S. L. A., 1884, or from the exercise in relation to the land of any other power given by the Settled Land Acts (as in *Re Ridge*, 31 Ch. D. 504, cited on subs. (iv.), *infra*), would be applicable as capital money under those Acts, if a case for such application arose; but no other money held on the trusts of the settlement would: s. 33, *supra*, would not apply.

- (iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and

shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

SS. 63, 64.

SETTLEMENT;
BY WAY OF
TRUSTS FOR
SALE.

- (iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

The effect of this s. was to prevent trustees for sale selling without the consent of persons who might be tenants for life of the proceeds of sale. This difficulty has been removed by the S. L. A., 1884, s. 6 (1), *infra*.

Amendment
by S. L. A.,
1884, s. 6.

In determining whether land vested in trustees on an absolute trust for sale is subject to the provisions of this s. the Court looks simply at the instrument or instruments which originally created the trust; any subsequent sub-settlements of shares of the sale money are not taken into account: *Earle and Webster's Contract*, 24 Ch. D. 144; but see *Re Ridge*, 31 ib. 504. *and*

What is a
settlement
under s. 63.

As to the rights of a tenant for life under this s. to exercise the statutory powers, except the powers of sale and exchange, and to be let into possession, see *Re Bagot's Settlement*, 1894, 1 Ch. 177.

The provisions of s. 11, as to setting apart three-fourths of the rent under a mining lease, where the tenant for life is impeachable for waste, were applied to a lease under this s. by a tenant for life of proceeds of sale: *Re Ridge, ubi supra*; and see *Re Bagot's Settlement*.

XVI.—REPEALS.

REPEALS.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed.

Repeal of
enactments,
in schedule.

SS. 64, 65.

REPEALS.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

The only parts of Lord Cranworth's Act (23 & 24 Vict. c. 145) here repealed which are not re-enacted, are the provisions for the renewal of leases and for raising money for renewals. But those provisions were re-enacted by T. A., 1888, ss. 10, 11, and subsequently by T. A., s. 19.

The partial repeal of the Improvement of Land Act, 1864, renders it much easier to borrow under that Act for improvements. This Act does not enable borrowing for that purpose.

IRELAND.

Modifications
respecting
Ireland.

XVII.—IRELAND.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

48 & 49 Vict.
c. 73.
50 & 51 Vict.
c. 33.

See also Purchase of Land (Ireland) Act, 1885, ss. 6, 10, and 13; and Land Law (Ireland) Act, 1887, ss. 8 (6), 10, and 14 (1).

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

See s. 16 (iii.).

(5.) General Rules for purposes of this Act for Ireland

shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

S. 65.

IRELAND.

40 & 41 Vict.
c. 57.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act.

40 & 41 Vict.
c. 56.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

See Hughes v. Fanagan, 30 L. R. Ir. 111.

THE SCHEDULE.

REPEALS.

23 & 24 Vict. c. 145, in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	} in part; namely,—
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PARTS I. AND IV.

(being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881) (a).

27 & 28 Vict. c. 114, in part.	The Improvement of Land Act, 1864	} in part; namely,—
	Sections seventeen and eighteen :	
	Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice):	
	Except as regards Scotland.	
40 & 41 Vict. c. 18, in part.	The Settled Estates Act, 1877, in part ;	namely,—
	Section seventeen.	

Improvement of Land Act, 1864, s. 21, as altered by S. L. A.

In case of dissent, or when landowner's infant children are to be protected, Court of Chancery or

NOTE.—S. 21 of the Improvement of Land Act, 1864, as it must now (except as to Scotland) be read, is as follows:—

21. If and when any Dissent from any such Application to the Commissioners for their Sanction of proposed Improvements shall have been notified in Writing to the Commissioners, by the Commissioners, Trustees, Company, or other Body or Individuals interested in any River or Canal which would or might be interfered with as hereinbefore mentioned, the Landowner desiring such Improvements

(a) But ss. 8 and 9 of 23 and 24 Vict. c. 145, have been in part re-enacted by T. A., s. 19, *suprà*.

may apply to the High Court of Chancery in *England* or *Ireland* where such Lands are situate in *England* or *Ireland* respectively, or to the Court of Session where such lands are situate in *Scotland*, for an Order of such Court authorizing the Commissioners to entertain and proceed upon the Application for such proposed Improvements notwithstanding such Dissent; and such Application shall be made, as to Lands in *England*, to the Master of the Rolls or any one of the Vice Chancellors sitting at Chambers, by Summons, calling on the Party dissenting to show Cause why such Order should not be made; as to Lands in *Ireland*, to the Master of the Rolls, by summary Petition or otherwise, as he shall by any General Order direct; and as to Lands in *Scotland*, to either Division of the Court of Session in Time of Session, or to the Lord Ordinary sitting on Bills in Time of Vacation, by summary Petition; and the Court or single Judge, as the Case may be, to whom such Application shall be made, shall hear and determine such Application, and for that Purpose shall have Power to make or direct to be made all such Inquiries, and receive and entertain all such Statements and Evidence, on Oath or by Affidavit, as such Court or Judge may consider necessary or desirable, or as may be produced before them or him; and if upon a Consideration of all the Circumstances such Court or Judge shall be of opinion that the Commissioners should entertain and proceed upon such Application, an Order shall be made authorizing and requiring them to proceed thereon, and to deal with the same according to the Provisions of this Act authorizing them in that Behalf, notwithstanding such Dissent as aforesaid: Provided that if at any Time after Notification of such Dissent, and before any such Order shall have been applied for and made as aforesaid, such Dissent shall be withdrawn by a like Notification in Writing, it shall not be necessary to make or proceed with such Application, or to obtain such Order.

Session may
authorize
Commissioners
to proceed.

CHAPTER III.

THE SETTLED LAND ACT, 1884.

47 & 48 VICT. c. 18.

An Act to amend the Settled Land Act, 1882.

[3rd July, 1884.]

SS. 1, 2, 3, 4, **BE it enacted by the Queen's most Excellent Majesty, by**
 5. **and with the advice and consent of the Lords Spiritual**
 — **and Temporal, and Commons, in this present Parliament**
assembled, and by the authority of the same, as follows :

Short title. **1. This Act may be cited as the Settled Land Act, 1884.**

Interpretation. **2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882.**

Construction of Act. **3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.**

Fine on a lease to be capital money. **4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.**

Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general. **5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.**

The notice required by s. 45 of the S. L. A., is now, by s. 7 (i.) of S. L. A., 1890, dispensed with in the case of certain leases.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges,

partitions or leases effected, or in progress, or immediately intended.

SS. 5, 6.

(3.) Any trustee by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

Subs. 1 only applies to the case of a sale, exchange, partition, or lease. Specific notice within the meaning of *Ray's Settled Estates*, 25 Ch. D. 464, is still necessary as to a mortgage or charge. Sale includes an enfranchisement within the Act of 1882, s. 3 (ii.).

Under s. 44 of the Act of 1882, a trustee can apply to the Court for any particulars or information, and a tenant for life improperly refusing would be liable to costs. The cost of furnishing particulars and information being costs of the trust will be payable out of capital.

Under subs. 3 the waiver or acceptance to be complete must be by all the trustees, if more than one, and will include the required notice to the solicitor of the trustees, which is merely a secondary notice to the trustees.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person to execute any of the trusts or powers created by the settlement.

As to consents of tenants for life.

(2.) In the case of every other settlement not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of only one of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

392 THE SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

SS. 1, 2, 3.

to the mortgagees, in addition to their principal, to induce them to be redeemed), thought this construction of the Statute too narrow.

An investment, before this Act, of capital moneys in the purchase of terminable rent-charges, created under the Improvement of Land Act, 1864, is not money "expended in redeeming" the same under this s.: *Re Howard's S. E.*, 1892, 2 Ch. 233. This s. applies to improvements executed before and after the Act, but not to payments made before the Act: see S. C., at p. 242. An order for payment of instalments of rent-charge, so far as they remained unpaid after the Act, can be made, although the improved estate has been sold: see S. C., pp. 243-4; but such instalments will be paid only from the time when the tenant for life requires payment under this s.: see S. C., p. 244; *Re Dalison's S. E.*, 1892, 3 Ch. 522. A prospective order relating to capital moneys not in hand will not be made: *Re Marquis of Bristol's S. E.*, 1893, 3 Ch. 161.

See also, on this s., *Ex parte Vicar of Castle-Bytham*, 1895, 1 Ch. 348.

And as to what improvements are within this s., see *Re Newton's S. E.*, W. N. 1889, 201; 1890, 24.

Improvements mentioned in s. 13 of the Act of 1890 are within this s. (see s. 2 of the later Act); which will accordingly apply to a rent-charge under the Limited Owners' Residences Act, 1870, to the extent to which s. 13 of the S. L. A., 1890, allows capital money to be applied.

S. 28 of
S. L. A., 1882,
to apply to
improvements
within pre-
ceding section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

See *Re Howard's S. E.*, 1892, 2 Ch. 233, 241-2.

Short title.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

CHAPTER V.

THE SETTLED LAND ACT, 1889.

52 & 53 VICT. c. 36.

An Act to amend the Settled Land Act, 1882.

[12th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

SS. 1, 2, 3.

1. This Act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Construction and short title.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years purchase of the highest rent reserved by the lease or agreement.

Option of purchase in building lease, 45 & 46 Vict. c. 38.

See S. L. A., ss. 6, 7, 8, 31: and compare *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

Price to be capital money.

CHAPTER VI.

THE SETTLED LAND ACT, 1890.

53 & 54 Vict. c. 69.

An Act to amend the Settled Land Acts, 1882 to 1889.

[18th August, 1890.]

SS. 1, 2, 3, 4. BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

*Preliminary.**Preliminary.*

Short title. 1. This Act may be cited as the Settled Land Act, 1890.

Acts to be construed together.

2. The Settled Land Acts, 1882 to 1889, and this Act are to be read and construed together as one Act, and may be cited as the Settled Land Acts, 1882 to 1890.

Interpretation.

3. Expressions used in this Act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

*Definitions.**Definitions.*

Instrument in consideration of marriage, &c., to be part of the settlement.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition.

SS. 4, 5, 6, 7.

*Definitions.*45 & 46 Vict.
c. 38.

See S. L. A., s. 2 (1), *n.* "Pin money"; s. 20, *n.* "Family charges"; *Re Marquis of Ailesbury's S. E.*, 42 W. R. 45, where the charge was before this Act.

*Exchanges.**Exchanges.*

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

Creation of
easements
on exchange
or partition.

See S. L. A., s. 3 (iii.), (iv.); s. 17.

*Completion of Contracts.**Completion of
Contracts.*

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

Power to
complete
predecessor's
contract.

See S. L. A., s. 31; this Act by this s. extends the powers given by that s., to the case of contracts having priority to the settlement. North, J., has said that this s. does not apply to leases: *Re Kemeye-Tynte*, 1892, 2 Ch. 211, 213, but S. L. A., s. 20 (1), applies the word "convey" to a lease. S. L. A., s. 12 (i.), however, makes special provision for contracts for leases.

*Leases.**Leases.*

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life—

Provision as to
leases for 21
years.

(i.) Without any notice of an intention to make the

SS. 7, 8, 9.

Leases.

45 & 46 Vict.
c. 38.

same having been given under section forty-five of the Act of 1882; and

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

See S. L. A., ss. 6, 7, 45, and s. 10, *infra*.

As to exemption from punishment for waste, within this s., see *Davies v. Davies*, 38 Ch. D. 499 (a decision on the S. E. A., s. 46); also, 37 Sol. J. at p. 76, and cases there cited: also *Re Cartwright*, 41 Ch. D. 532.

Provision as
to mining
leases.

8. In a mining lease—

(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them :

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

See S. L. A., ss. 6, 7, 9.

Power to
reserve a
rent-charge
on a grant in
fee simple.

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereof of a perpetual rent or rent-charge, the reservation shall operate to create a rent-charge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rent-charge so created shall go and remain to the uses on the trusts and subject to the

44 & 45 Vict.
c. 41.

powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

SS. 9, 10.
Leases.

See S. L. A., ss. 10, 24, 2 (10) (i.).

Mansion and Park.

*Mansion and
 Park.*
 Restriction on
 sale of
 mansion.

10.—(1.) From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

For the principles on which the Court makes or refuses the order, see *Re Marquis of Ailesbury's S. E.*, 1892, 1 Ch. 506, 546; 1892, A. C. 356. And the Court may consider the welfare of the estate and the tenants and labourers.—S. C.

Order of
 Court.

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

This s. applies to a lease of easements over the park, &c.: *Sutherland v. Sutherland*, 1893, 3 Ch. 169.

Easements
 over park.

For a case of one mansion-house, with lands in different counties, distant from each other, see *Re Thompson*, 21 L. R. Ir. 109.

Land in
 different
 counties.

As to the circumstances under which the Court will, under the S. E. A., authorize a sale of the mansion-house where the tenant for life is an infant, though a remainderman objects, see *Marquis of Camden v. Murray*, 27 Sol. J. 652.

Sale of
 mansion, re-
 mainderman
 objecting.

The fact that the mansion is expressly excepted from the power of sale given by the settlement will not prevent the Court from authorizing a sale: *Re Brown's Will*, 27 Ch. D. 179.

Effect of
 express
 exception.

The consent of the mortgagee of the estate for life is of course necessary: S. L. A., s. 50 (3): *Re Sebright*, 33 Ch. D. 429.

Mortgagee's
 consent.

SS. 10, 11, 12.

Mansion and Park.

Provision in future as to mansion, &c.

All future settlements should contain, as authorized by S. L. A., s. 57, an express provision removing the restriction imposed by S. L. A., 1890, s. 10, and, where still necessary, defining the house and land to which it applies.

For form of summons for leasing under this s., see Forms IV. and V.; and for sale, Forms VI. and VII., Chap. viii., *infra*; and as to service of the summons, r. 4, *ib.*; and for Forms of Orders, Seton, (5th ed.), 1514—17, 1519.

The Raising of Money.

Power to raise money by mortgage.

The Raising of Money.

11.—(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

Trustees should be parties to mortgage.

Where the transaction is wholly or partly a new mortgage to secure an existing debt which is transferred, and there is no money to be paid to the trustees, still it is conceived the trustees must be parties to the mortgage and direct payment by the mortgagee to the transferor; and see S. L. A., s. 45; S. L. A., 1884, s. 5 (5), *n.*

“Incumbrance.”

It is conceived that this s. applies to all incumbrances, whether prior to the settlement or not (see the facts of the case cited below), and whether raised or not raised.

S. L. A., s. 53.

The tenant for life will be restrained from mortgaging a part of the settled land not already mortgaged, if the mortgage is injurious to the interests of others claiming under the settlement: *Hampden v. Earl of Buckinghamshire*, 1893, 2 Ch. 531.

Dealings as between Tenant for Life and the Estate.

Provision enabling dealings with tenant for life.

And as to the powers, apart from this Act, of a tenant for life to deal with mortgages on the settled land, see *More v. More*, 37 W. R. 414.

Dealings as between Tenant for Life and the Estate.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of

land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

SS. 12, 13.

Dealings as between Tenant for Life and the Estate.

Application of capital money.

Application of Capital Money.

Application of Capital Money.

13. Improvements authorized by the Act of 1882 shall include the following; namely,

- (i.) Bridges;
- (ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;
- (iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;
- (iv.) The rebuilding of the principal mansion-house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

As to what improvements are, or are not, authorized under this s. Improvements.
& S. L. A., s. 25, see note to that s. *supra*.

As to what is an "addition to or alteration in buildings," see *Re Gaskell's S. E.*, 1894, 1 Ch. 485. There must be a present intention to let, if not an actual prospect of letting, to be within subs. (ii.): *Re De Teissier's S. E.*, 1893, 1 Ch. 153; *Re Lord Gerard's S. E.*, 1893, 3 Ch. 252, 260, 264, 267. "Rebuilding," in subs. (iv.), does not include structural repairs: *Re De Teissier's S. E.*, *ubi sup.*; but the alteration, enlargement, and reconstruction of a mansion may be within the subs., although part of the mansion house is left intact, or some of the walls are utilized: *Re Walker's S. E.*, 1894, 1 Ch. 189; and see *Re Gaskell's S. E.*, *ubi sup.*

Additions or alterations.
Present intention to let.

"Rebuilding."

SS. 13, 14, 15.

*Application of
Capital Money.*

"Annual
rental."

Land Clauses
Acts.

General
jurisdiction.

Capital money
in Court may
be paid out to
trustees.

Court may
order pay-
ment for
improvements
executed.

The income, arising from capital moneys, should be included when calculating the "annual rental": *Re De Teissier's S. E., ubi supra*; also the rents of all estates settled on the same limitations as that on which the mansion-house stands: *Re Lord Gerard's S. E., ubi supra*; also the rental value of a farm usually let, but for the time being unlet; but not the rental value of land in the occupation of the tenant for life: *Re Walker's S. E., ubi supra*. There are no deductions to be made as there are under s. 4 of the Limited Owners' Residences Act, 1870. As to the time when the rental should be calculated, see Sugd. Pow. (8th ed.), 706.

The decisions, as to the application of purchase money, under the Lands Clauses Acts, are not applicable to this s. or S. L. A., s. 25, *supra*: *Re Lord Gerard's S. E., ubi sup.*

As to the general jurisdiction of the Court in authorizing repairs and improvements, see *Re De Teissier's S. E., ubi sup.*

For further powers as to erection of a mansion-house, see the Limited Owners' Residences Acts, 33 & 34 Vict. c. 56; and 34 & 35 Vict. c. 84.

14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

This s. meets the decision in *Cookes v. Cookes*, 34 Ch. D. 498; and see S. L. A., 1882, s. 21 (ix.), n., s. 22.

15. The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court.

See S. L. A., s. 26, and note thereto.

Under this s., capital money will be applied in recouping to a tenant for life the cost of improvements executed since 1882: *Re Ormrod's S. E.*, 1892, 2 Ch. 318; but, even if the s. is retrospective, the Court will not usually make the order as regards improvements executed before 1883, see S. C.; nor direct repayment of instalments of a rent-charge, paid by a tenant for life before the date at which he has required redemption under the S. L. A., 1887: *Re Dalisons' S. E.*, 1892, 3 Ch. 522; *Re Howard's S. E.*, 1892, 2 Ch. 233; nor make a prospective order directing future capital moneys to be applied in payment of costs of improvements executed, or in repayment of moneys paid, or to be paid,

in keeping down charges created to raise money for improvements: *Re Marquis of Bristol's S.E.*, 1893, 3 Ch. 161; see also *Re Millard's S.E.*, *ib.* 116.

SS. 15, 16, 17.

Application of Capital Money.

Trustees.

Trustees.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

Trustees for the purposes of the Act.

- (i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then
- (ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale, of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

See S. L. A., s. 2 (8); and, on subs. i., *Re Broun's Will*, 27 Ch. D. 179; *Constable v. Constable*, 32 *ib.* 233, 237; on subs. ii., *Wheelwright v. Walker*, 23 *ib.* 752, 761; *Re Bryant*, 44 Ch. D. 218.

17.—(1.) All the powers and provisions contained in the Conveyancing and Law of Property Act, 1881, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

Application of provisions of 44 & 45 Vict. c. 41, as to appointment of trustees.

(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement

SS. 17, 18, 19. *of trustees taking place before as well as after the passing of this Act.*

Trustees.

(3.) *This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881.*

This s. is repealed and in effect replaced by T. A., s. 47, *suprà*.

Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

18. The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum.

See Chap. VII., *infra*.

Power to vacate registration of writ.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any Judge thereof.

See Land Charges Registration and Searches Act, 1888, s. 5 (4), n., *suprà*.

CHAPTER VII.

THE HOUSING OF THE WORKING CLASSES ACT, 1890 (53 & 54 VICT. c. 70), s. 74, SUBS. (1).

[18th August, 1890.]

74.—(1.) The Settled Land Act, 1882, shall be amended as follows:—

Amendment of
45 & 46 Vict.
c. 38.

- (a) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working classes, may be made at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.
- (b) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artisans whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

This s. is a re-enactment of s. 11 of the Housing of the Working Classes Act, 1885, which Act is repealed (except as to a small part, not including s. 11) by s. 102 of this Act.

The last clause of the s. seems to imply that in every case the opinion of the Court must be obtained that the expenditure is not injurious to the estate; at least, it will not be prudent for trustees to omit to do so.

CHAPTER VIII.

THE SETTLED LAND ACT RULES, 1882.

December, 1882.

1. THE expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the Court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

Cost of petition.

[NOTE.—Costs of a petition were allowed in *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541; *Re Arnold*, 31 Sol. J. 560; *Ex parte Jesus College*, 50 L. T. 583; and *Re Earl de Grey*, W. N., 1887, 241. It is understood that this r. applies to an application for payment out of Court, to S. L. A. trustees, of a fund exceeding £1000.]

Fund exceeding £1000.

3. The forms in the Appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

[NOTE.—Form ii. now needs some modification to meet the existing R. S. C.: see note to that Form, *infra*.]

4. The persons to be served with notice of applications to the Court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

[NOTE.—S. 15 is now repealed, and, in the main, re-enacted by S. L. A., 1890, s. 10.]

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

[NOTES.—The proper time for an application under this rule in regard to the appointment of new trustees, is after a summons for their appointment has been taken out; but where an action had been commenced and an injunction obtained to restrain an intended sale by the tenant for life until trustees for the purposes of the Act had been appointed, an order as to the service of notice of the summons was made before the summons was taken out: *Wheelwright v. Walker*, 28 Ch. D. 763.

Service on the children of the tenant for life was dispensed with, where the Court deemed their interests sufficiently represented by the trustees, who had been served: *Re Brown's Will*, 27 Ch. D. 180.]

And see, on this and the two preceding rr., *Re Marq. of Ailesbury*, S. E., 42 W. R. 46.

7. It shall be sufficient upon any application under the

Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorized or directed by the Court under the Act, shall be carried into effect out of Court, unless the judge shall otherwise order, and generally in such a manner as the judge may direct.

9. Where the Court authorizes generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorizes any such lease or grant in any particular case, or where the Court authorizes a lease under section 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

[NOTE.—As to leases under s. 15 see now S. L. A., 1890, s. 10.]

10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into Court. (Appendix, Forms IX., X., XI.)

11. The summons shall be supported by an affidavit setting forth :—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into Court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into Court may contain directions for investment of the money on any securities authorized by section 21, sub-section 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested.

13. Money paid into Court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.)

14. Any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

[NOTE.—It is submitted that this rule, 14, is *ultra vires*. The whole purchase-money must under the Act be paid to the trustees and a receipt given or it must be paid into Court, otherwise the estate will not pass by the conveyance. This is the old rule in case of an exercise of an ordinary power (*Cockerell v. Cholmeley*, 1 Clarke & Fin. 60) and must apply to a sale under this Act: see also Daniell's Chancery Forms (4th ed.), p. 1005, n. (a), and, as to the old practice, *Christian v. Chambers*, 4 Hare, 307. However, in *Cardigan v. Curzon-Howe*, 30 Ch. D. 531, the order was (p. 540) that purchaser deduct costs of summons out of the fund before paying it in: and see S. L. A., s. 21, "subject to payment of claims properly payable thereout." When the whole money has been paid to the trustees, any costs properly payable can then be paid.]

15. In all cases not provided for by the Act or these rules, the existing practice of the Court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to Court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX. (1)

FORM I.

TITLE OF PROCEEDINGS. (2)

IN the High Court of Justice,
Chancery Division,
Vice-Chancellor Bacon,
or

Mr. Justice Chitty,

[or other judge before whom the application is to be heard.]

In the matter of the estate [*or, of the timber upon the estate*], situate at in the county of , [*or, of the chattels*], settled by a settlement made by an indenture dated the day of , and made between [*or, by the Will of* dated] *or as the case may be.*

And in the matter of the Settled Land Act, 1882.

FORM II.

FORMAL PART OF SUMMONS. (3)

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of , 18 , at o'clock in the forenoon, on the hearing of an application

(*a.*) On the part of *A. B.*, the tenant for life [*or, tenant in tail, or*

(1) The Appendix referred to in the preceding rules under S. L. A.

(2) See also Table of Titles, &c., of Petitions and Summonses in the Annual Practice (1895), vol. i. Part III., pp. 1244-5; and *Re Wells*, Seton (5th ed.), 1512.

And, as to title of proceedings under the Act, where an action is pending for execution of trusts of the settlement, see *Re Parry*, W. N., 1884, 43.

(3) See now O. 54 r. 4 B. (R. S. C., November, 1893), and Annual Practice (1895), vol. ii. p. 108: Marcy and Prior, "Forms of Originating Summons," 1895, pp. 50-56.

as the case may be, describing the nature of the applicant's estate] under the above-mentioned settlement.

Or, (b.) On the part of *A. B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant, by *X. Y.*, his testamentary guardian [*or, guardian appointed by order dated the or, next friend*].

Or, (c.) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (d.) On the part of *G. H.*, the tenant for life in remainder [*or, tenant in tail in remainder, or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

Or, (e.) On the part of *I. J.*, the purchaser of the lands [*or, the timber upon the lands, or chattels, or as the case may be*] settled by the above-mentioned settlement.

Or, (f.) On the part of *I. J.*, the lessee under a mining lease dated the , 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (g.) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (h.) On the part of *K. L.*, interested under the contract herein-after mentioned.

Dated the day of , 18

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons (if any) on whom the summons is to be served.*)

FORM III.

SUMMONS UNDER S. 10 FOR GENERAL LEASING POWERS.

Title and formal parts as in Forms I. and II. (a) or (b).

1. That the applicant [*or in the case of an infant that the said X. Y. during the infancy of the said A. B.*], and each of his successors in title [*or in the case of an infant, each of the successors in title of the said A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorized from time to time to make building [*or mining*] leases of the lands comprised in the said settlement for the term of years [*or in perpetuity*] on the conditions specified in the said Act [*or on other conditions than those specified in sections 7 to 9 of the said Act*].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be

paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

[*Note.*—The costs are directed to be taxed as between solicitor and client: see S. L. A., s. 46 (6).]

FORM IV.

SUMMONS UNDER SS. 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That the conditional contract, dated the 18 , and made between the applicant [*or the said X. Y.*] of the one part and of the other part, for a [*building or mining*] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or 15*] of the above-mentioned Act be approved, and that the said *A. B.* [*or X. Y.*] may be authorized to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III. 2.*)

[*NOTE.*—S. 15 is now repealed, and, in the main, re-enacted by S. L. A., 1890, s. 10.]

FORM V.

SUMMONS UNDER SS. 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That the [*building or mining*] lease intended to be granted to of the lands [*or of the mansion-house, &c.*] settled by the said settlement may, pursuant to section 10 [*or 15*] of the above-mentioned Act, be approved, and that the applicant [*or the said X. Y.*] may be authorized to execute the same.

2. (*Add application for costs as in Form III. 2.*)

[*NOTE.*—As to s. 15, see note to Form IV.]

APPENDIX.

FORM VI.

SUMMONS UNDER SS. 15, 35, OR 37, FOR A SALE OUT OF COURT OF
THE PRINCIPAL MANSION-HOUSE, AND DEMESNES, OR OF TIMBER
OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That the applicant [*or in the case of an infant the said X. Y.*] may be authorized to sell the principal mansion-house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act*], *or if this Form is not applicable as in Form III. 2.*

[NOTE.—As to s. 15, see note to Form IV.]

FORM VII.

SUMMONS UNDER SS. 15, 35, OR 37, FOR SALE BY THE COURT OF THE
PRINCIPAL MANSION-HOUSE, AND DEMESNES, OR OF TIMBER OR
CHATTELS.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That the principal mansion-house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*] settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III. 2.*)

[NOTE.—As to s. 15, see note to Form IV.]

FORM VIII.

AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I of make oath and say as follows :

1. By the above-mentioned settlement the above-mentioned lands [*or certain chattels, shortly describing them*] stand limited to uses [*or upon trusts*] under which *A. B.* is [*or I am*] beneficially entitled in

possession as tenant for life [*or tenant in tail or tenant in fee simple, with an executory gift over, or as the case may be*].

2. (*If it is a fact.*) The said *A. B.* is an infant of the age of years or thereabouts.

3. *C. D.* of and *E. F.* of are Trustees under the said settlement, with a power of sale of the said lands [*or with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, or are the persons by the said settlement declared to be Trustees thereof for purposes of the above-mentioned Act*].

FORM IX.

SUMMONS UNDER S. 22 BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. (e).

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or will, &c.*] proceeds of sale of the *A.* estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase money of the said *A.* estate [*or as the case may be*] settled by the said settlement [*or will, &c.*].

2. That such directions may be given for the investment of the said sums when paid into court, and the accumulation or payment of the dividends of the securities, representing the same as the Court may think proper.

FORM X.

SUMMONS UNDER S. 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* S. 11).

Title as in Form I.

Formal parts as in Form II. (f).

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement dated the and made between [*or the will, &c.*] mineral rents under lease dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or one-fourth*] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term

created by the said lease to pay into court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement during his life or until further order.

[NOTE.—As to deduction of costs of payment in, see note to r. 14, *suprà*.]

FORM XI.

SUMMONS UNDER S. 22 FOR PAYMENT INTO COURT BY MORTGAGEE
(see S. 18).

Title as in Form I.

Formal parts as in Form II. (*g*).

1. That the applicant may be at liberty to pay into court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or the will, &c.*] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII. 2.*)

[NOTE.—The directions for investment are in fact in Form IX. 2. As to deduction of costs, see note to Form X.]

FORM XII.

SUMMONS UNDER S. 26 (1).

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III. 2.*) .

FORM XIII.

SUMMONS UNDER S. 26, SUBS. (2) (ii.) FOR APPOINTMENT OF AN
ENGINEER OR SURVEYOR.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That *M. N.* of engineer [*or surveyor*] may be approved as engineer [*or surveyor*] for the purposes of section 26, sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III. 2.*)

FORM XIV.

NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C. D.* of and *E. F.* of the Trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of engineer [*or surveyor*], for the purposes of section 26, sub-section (2) (ii.) of the said Act.

(Signed) *C. D.*
E. F.

FORM XV.

SUMMONS UNDER S. 26, SUBS. (2) (iii.).

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That *C. D.* and *E. F.*, the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said Act.

2. (*Add application for costs as in Form III. 2.*)

[NOTE.—See now S. L. A., 1890, s. 15, as to dispensing with scheme.]

FORM XVI.

SUMMONS UNDER S. 26, SUBS. 3.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That the sum of £ may be ordered to be raised out of the
 in court to the credit of and that the same when raised
 may be paid to upon his undertaking to apply the same in pay-
 ment for [*describe the works or operation*] being part of an improve-
 ment executed upon the land settled by the above-mentioned settle-
 ment pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III. 2.*)

[NOTE.—See note to Form XV.]

FORM XVII.

SUMMONS UNDER S. 31.

Title as in Form I.

Formal parts as in Form II. (a) or (b).

1. That the applicant may be at liberty to enforce [*or carry into effect or vary or rescind as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III. 2.*)

FORM XVIII.

SUMMONS UNDER S. 34 FOR APPLICATION OF MONEY PAID FOR A
LEASE OR REVERSION.

Title as in Form I.

Formal parts as in Form II. (a), (b), or (d).

1. That the sum of £ being the proceeds of sale of a lease for
 years [*or life or a reversion or other interest, describing it*] settled by
 the above-mentioned settlement, may, pursuant to section 34 of the
 above-mentioned Act, be directed to be applied for the benefit of the
 parties interested under the said settlement in such manner as the
 Court may think fit.

2. (*Add application for costs as in Form III. 2.*)

FORM XIX.

SUMMONS UNDER S. 38 FOR THE APPOINTMENT OF NEW TRUSTEES.

Title as in Form I.

Formal parts as in Form II. (a), (b), (c), or (d).

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.
 2. (*Add application for costs as in Form III. 2.*)
-

FORM XX.

SUMMONS UNDER S. 44.

Title as in Form I.

Formal parts as in Form II. (a), (b), or (c).

1. That it may be declared that (*set out the declaration required*).
 2. (*Add application for costs as in Form III. 2, or as the circumstances require.*)
-

FORM XXI.

SUMMONS UNDER S. 56 FOR ADVICE AND DIRECTION.

Title as in Form I.

Formal parts as in Form II. (a) to (h).

For the opinion, advice, and direction of the Judge on the following questions:—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the Judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III. 2.*)

FORM XXII.

SUMMONS UNDER S. 60 FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.

Formal parts as in Form II. (b).

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-

mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.

2. (*Add application for costs as in Form III. 2.*)

[(1.) NOTE.—The settlement may be described as a "settlement deemed to be existing under the S. L. A., 1882:" *Re Wells*, Seton, 5th ed., p. 1512; see also Annual Practice, 1895, vol. i., p. 1244.]

FORM XXIII.

SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of ,
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